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SUPREME COURT, U.S.

NO. 83-5209

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STEPHEN TODD BOOKER,

Petitioner,

-v-

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. May a capital defendant be cross-examined at the sentencing phase of his trial concerning highly unreliable information regarding his alleged prior bad acts when the information on which the questions were based was obtained from the defendant involuntarily by a psychiatrist examining him pursuant to a court order and, thus, in violation of the fifth and fourteenth amendments?

2. Does the presentation of such highly unreliable information regarding a capital defendant's alleged prior bad acts as an aggravating factor by the prosecutor conflict with the reliability required for capital sentencing by the eighth and fourteenth amendments?

3. Did the Eleventh Circuit err in upholding jury instructions that a reasonable juror might well have understood to preclude consideration of nonstatutory mitigating circumstances through:

(i) a disregard of Sandstrom v. Montana, 442 U.S. 510 (1979), thus creating a conflict with the Fifth Circuit's condemnation of identical jury instructions in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); and

(ii) a failure to recognize that instructional error under Lockett v. Ohio, 438 U.S. 586 (1978), infects a capital sentencing trial with prejudice sufficient to satisfy the requirements of Wainwright v. Sykes, 433 U.S. 72 (1977), and United States v. Frady, 456 U.S. 152 (1982)?

4. Does the Florida Supreme Court's systematic, secret, ex parte solicitation and consideration of extra-record, prison-generated psychological evaluations and similar materials of questionable reliability concerning capital appellants in cases pending before it for sentencing review violate the fifth, sixth, eighth, and fourteenth amendments?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Petitioner, STEPHEN TODD BOOKER, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed April 25, 1983. Rehearing was denied on June 6, 1983.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 703 F.2d 1251 (11th Cir. 1983), and is set out at pages 1a-11a of the Appendix.*/ The order denying rehearing is noted at 708 F.2d 734 (11th Cir. 1983).

JURISDICTION

The judgment and opinion of the court of appeals were filed on April 25, 1982, and petitioner's timely petition for rehearing was denied on June 6, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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*/ Citations to the Appendix accompanying this petition are designated __a. Citations to the record of the state trial are designated by R. __. Citations to the transcript of the sentencing proceeding before the judge are designated by S.P. __.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the fifth amendment to the Constitution which provides in relevant part:

> No person ... shall be compelled in any criminal case to be a witness against himself ...;

the sixth amendment to the Constitution which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the assistance of counsel for his defense;

the eighth amendment to the Constitution which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law ....

It also involves Section 921.141, Florida Statutes (1973), which is set out at pp. 12a-13a of the Appendix.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Petitioner was convicted of first degree murder, sexual battery, and burglary on June 19, 1978, and sentenced to die. His conviction was affirmed. Booker v. State, 397 So.2d 910 (Fla.), cert. denied, 454 U.S. 957 (1981). He joined the class of death sentenced prisoners that unsuccessfully petitioned the Florida Supreme Court for relief based on that court's consideration of extra-record psychological material in affirming death sentences. Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S.

1000 (1981).

Petitioner's execution was set for April 22, 1982. On April 13, he filed a writ of habeas corpus in the Northern District of Florida. It was denied. The Eleventh Circuit granted a stay pending appeal. Booker v. Wainwright, 675 F.2d 1150 (11th Cir. 1982). The panel opinion on the merits rejected petitioner's claims. Booker v. Wainwright, 703 F.2d 1251 (11th Cir. 1983). Rehearing was denied on June 6, 1983. Booker v. Wainwright, 708 F.2d 734 (11th Cir. 1983).

B. Facts Relevant to the Questions Presented

(1) Petitioner's Challenge to the Use in Cross-examination at the Penalty Phase of Highly Unreliable Information Obtained from him Involuntarily by the Psychiatrist Examining him for Competency Pursuant to a Court Order in Violation of the Fifth and Fourteenth Amendments:

Petitioner Stephen Todd Booker was convicted of the rape/murder of a ninety-four year old woman. Booker has a history of mental illness, psychiatric hospitalization, alcoholism, and drug abuse that goes back to age 13. He was first hospitalized at the ages of 13 and 15 in New York. At nineteen, he was hospitalized at Camp Codie Medical Center on Okinawa while he was in the service. He was hospitalized at Camp Codie again the same year. R. 586-87. He was a psychiatric patient at Walter Reed in Washington for two months in 1973, where he was diagnosed as suffering from paranoid schizophrenia and organic brain syndrome. Id.; R. 476-77. He was hospitalized twice more while in the service: at Fort Dix in both 1973 and 1974. After discharge, he was hospitalized again in New York. R. 586-87.

At the time of his arrest, petitioner "confessed" to the interrogating officer, Detective Price. Price testified that Booker only talked about himself in the third person after he had been transformed into Aniel, "who he also described as a demon

R. 375. As the officer described it, the transformation would begin with Booker working himself up into a frenzy. R. 377. His eyes would become glassy. R. 376-77. As Aniel, "his teeth were clenched tightly until they would crack.... I could hear them crunch. He would whisper through his teeth, and I would have to lean forward toward him in order to hear." R. 376. When the officer questioned him about Aniel, "he would burst into tears and cry. And he would laugh and wipe his tears away in a split second. He would then settle back in the chair, face me again, and be in a word, calm." R. 378.

Price also testified that when he spoke to him after the "confession," Booker did not recall having told him about Aniel. Price testified that Booker only remembered the crime when he assumed the personality of Aniel, R. 380-81, and that Booker seemed truthful and sincere both as Booker and as Aniel. R. 381. Finally, Price testified that he discovered that the name "Aniel" was derived from the Latin for doddering old woman. Id.

Because of this "bizarre behavior" and Booker's attempted suicide,[1/] the Alachua County Circuit Court ordered that

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1/ The suicide note, which was produced by the state in discovery and made part of the record on appeal to the Florida Supreme Court, began: "There is but one way to stop this raging inside me. I'm an unwilling subject for some strange test or something...." It contains several references to "this devil [which] is attempting to come forth again and subdue me permanently and place me in the extreme evident state of insanity," "the ranting beast that walks inside me," "this demon," and the "invisible forces like the beast." Amended Answer to Demand for Discovery, Feb. 16, 1978. The note also recounts that Booker "dreamed that the beast took me to the very throne of the devil and we talked about all that I knew. I did not mention it to the person in the cell with me, but he asked me where I went that night fore [sic] he had climbed off the top bunk the [sic] use the toilet and said I was not there." Id. Booker also wrote an unintelligible prayer on the wall of his cell and drew four crosses in blood on the walls. Id.

Booker be hospitalized and examined by two psychiatrists to determine his competency to stand trial and his sanity at the time of the crime. The two psychiatrists were unable to reach a conclusion regarding sanity. 703 F.2d at 1253. A third psychiatrist was then appointed. He too was unable to reach a conclusion regarding petitioner's sanity. R. 477-78, 482.

At the sentencing phase, Booker took the stand and described his history of hospitalization for psychiatric illness. He testified that he did not remember committing the crime he was convicted of, but that he would feel remorse if he did. R. 584. He also testified that he has had problems with memory lapses since age 13 and that three of the eight hospitalizations were for that reason. R. 587.

On cross-examination, the prosecutor inquired about alleged acts of violence during the course of robberies of houses of prostitution while Booker was in the service on Okinawa.

> Q. Do you have problems with acts of violence while you were in the service?
>
> A. Yes. I did.
>
> Q. Other than these for fighting, have you ever attempted to kill people?
>
> Q. While you were in Okinawa in the houses?
>
> A. Could be?
>
> Q. Do you know what I am talking about, Mr. Booker?
>
> A. Yes.
>
> Q. I'm talking about houses of prostitution. Did you ever try to kill anybody over there?
>
> A. Not necessarily. I used to -- we used to rob cat houses.
>
> Q. What weapons did you use to hit people with?
>
> A. Claw hammer.

Q. How many people do you think you hit with the claw hammer?

A. I can't recollect.

Q. More than five?

A. I would say about five.

Q. More than ten?

A. No.

R. 841-42. The prosecutor also inquired about the number of Article 15 disciplinary actions and courts-martial Booker had. Booker answered 11 and 1, respectively. R. 590. A check of the Army records by the probation officer who did the presentence report, however, showed that Booker only had one Article 15 and no military record concerning the alleged robberies and assaults on Okinawa. S.P. at 24-25. Because this information only came out in the presentence report before the judge, the jury that rendered the advisory death sentence never knew of the unreliability of this information.

The prosecutor also cross-examined Booker regarding his recollection of his thoughts on the day of the murder. R. 844-45; 703 F.2d at 1258. The information that formed the basis of both portions of the cross-examination was obtained from the psychiatrist that examined Booker. R. 629-30; 703 F.2d at 1256-57. It is not disputed that the psychiatrists who examined Booker did not warn him regarding his rights as required by Estelle v. Smith, 451 U.S. 454 (1981).[2/]

In the Eleventh Circuit, the state argued that any claim concerning the violation of Booker's fifth amendment rights by the use of this information was barred under Wainwright v. Sykes, 433 U.S. 72 (1977). The court of appeals held that it was not barred because the issue was dealt with by the Florida Supreme Court on the

2/ Smith was given retroactive effect in Battie v. Estelle, 655 F.2d 692 (5th Cir. 1982).

merits of the constitutional claim. 703 F.2d at 1255 (citing County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979)). Moreover, the trial record reveals that an objection was made. R. 629.

On the merits, the court of appeals accepted the factual premises of Booker's claim.[3/] It accepted the fact that the information that formed the basis of the two challenged portions of the cross-examination of petitioner was obtained in violation of the fifth amendment under Estelle v. Smith. 703 F.2d at 1258-59. And it accepted the fact that the introduction of the sanity issue at trial did not waive petitioner's fifth amendment rights with respect to the use of material subject to the privilege at the sentencing phase to obtain his death. Nevertheless, it held that the questioning of petitioner based on illegally obtained information was permissible under the doctrine of Harris v. New York, 401 U.S. 222 (1971), that prior inconsistent statements obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), could be used for impeachment. The panel went on to note that the cross-examination did not rise to the level of a constitutional violation but was, at most, objectionable as being outside the scope of direct. 703 F.2d at 1258.

(2) Petitioner's Challenge to the Presentation of such Highly Unreliable Information as an Aggravating Factor in Violation the Eighth and Fourteenth Amendments:

While this cross-examination was only allowed as proper impeachment, there was no limiting instruction to the jury that it should consider the testimony regarding the prior bad acts only on the issue of credibility. The prosecutor, moreover, invited both the jury and the trial judge to consider that testimony in imposing sentence. He told the jury that: "First, mitigation can be that the defendant has no significant history of prior criminal activity.

3/ Booker was denied a hearing in the federal district court.

That's not true in this case. You have heard the testimony." R. 611 (emphasis added). He reaffirmed that thought to the sentencing judge. S.P. at 40. And he specifically suggested to both the jury and the sentencing judge that the petitioner would continue his violent ways unless finally "deterred" by the death penalty. R. 605; S.P. at 45.[4/]

The record suggests that the jury was affected by the testimony of the alleged prior violent acts. Booker's lawyer argued it to the trial judge, specifically noting the physical reaction of many of the jurors when that testimony was adduced. S.P. at 24-25, 25-26. Even the prosecutor, whose personal speculation was that the jury was just as impressed with other testimony, agreed that the Okinawa testimony did tend to "show a background of bad character." Id. at 39-40.

In the Eleventh Circuit, petitioner argued that the presentation of the alleged prior acts of violence as an aggravating circumstance introduced arbitrary and unreliable considerations into the sentencing process because this information lacked the reliability of evidence of prior convictions. The Eleventh Circuit rejected this claim on two grounds. First, it noted that the jury had been instructed to consider only the statutory aggravating circumstances. The court refused to assume that the jury would disregard those insructions. 703 F.2d at 1259. However, it did not consider the prosecutor's express invitation to the jury to do just that. Second, it found "no hint in the record" that the jury

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4/ The prosecutor told the jury: "I know it [the death penalty] is a deterrent from that killer ever killing again." R. 605. To the judge, he argued "that rehabilitation for him is not a realistic goal an he [the defendant] tells you that twenty-five years will not help to change that realism that he will kill again." S.P. at 45. To the extent that such "realism" was the result of Booker's mental illness, the prosecutor "attached the 'aggravating' label ... to conduct that actually should militate in favor of a lesser penalty...." Zant v. Stephens, ___ U.S. ___, 51 U.S.L.W. 4891, 4897 (June 22, 1983).

would have considered the alleged prior acts of violence as an aggravating circumstance. Id.

(3) Petitioner's Challenge to Instructions That Might Well Lead a Reasonable Juror to Conclude That the Jury was Forbidden to Consider Relevant Mitigating Circumstances.

This issue is substantially similar to the question presented in the petition for a writ of certiorari in Ford v. Strickland, No. 82-6923, filed in this Court on June 14, 1983. In this case, the instructions to the jury at the penalty phase were that:

> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence.... [The court listed the statutory aggravating circumstances]
>
> The mitigating circumstances you may consider if established by the evidence are as follows.... [The court listed the statutory mitigating circumstances]

R. 623, 625. Unlike Ford, however, there is nothing in this record that suggests that the trial judge considered nonstatutory mitigating factors, that he understood they could be considered, or that such an impression was conveyed to the jury.

There was no contemporaneous objection to these instructions. In federal habeas, petitioner argued that he had not commited a procedural default because the instructions were consistent with Florida law and federal constitutional doctrine as they existed at that time. Under Cooper v. State, 336 So.2d 1133 (Fla. 1976), Florida law limited consideration to statutory mitigating circumstances. See Barclay v. Florida, ___ U.S. ___, 51 U.S.L.W. 5206, 5212, n.3 (July 6, 1983)(Stevens, J., concurring); Perry v. State, 395 So.2d 170, 174 (Fla. 1981) (in excluding nonstatutory mitigating evidence under Cooper, trial judge "followed the law as he believed it was being interpreted at the time of trial"). Petitioner's trial was held before the decisions in Lockett v. Ohio,

438 U.S. 586 (1978), and Songer v. State, 365 So.2d 696 (Fla. 1978), which set the matter straight as a matter of both Florida and federal constitutional law.

The court of appeals rejected this claim based on the decision in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983)(en banc). 703 F.2d at 1259-60.

(4) Petitioner's Challenge to the Florida Supreme Court's Ex Parte Solicitation, Receipt, and Consideration of Evaluative Materials Concerning Capital Defendants Whose Appeals Were Before the Court:

Since at least as early as 1975, the Supreme Court of Florida has, without the knowledge of the appellants or their counsel, requested, received, and considered materials from prison officials relating to death-sentenced appellants in pending appeals. The existence of this practice has never been disputed. It is clear in this case that the Florida Supreme Court reviewed at least one document regarding Mr. Booker: a post-sentence, prison-generated psychological report.

Mr. Booker was one of the petitioners in the original habeas filed in the Florida Supreme Court. Brown v. Wainwright, 392 So. 2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981). The Eleventh Circuit rejected Mr. Booker's Brown claim based on the decision in Ford v. Strickland. Booker, 703 F.2d at 1260.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS MISAPPLIED THE DECISIONS OF THIS COURT WHEN IT UPHELD THE CROSS-EXAMINATION OF A CAPITAL DEFENDANT AT THE SENTENCING PHASE CONCERNING HIS ALLEGED PRIOR BAD ACTS BASED ON INFORMATION THAT WAS OBTAINED FROM THE DEFENDANT INVOLUNTARILY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

This case presents important questions regarding the application of this Court's decision in Estelle v. Smith, 451 U.S. 454 (1981), holding that statements obtained from a capital defedant by a court appointed psychiatrist cannot be used against him at the penalty phase. It does so in a uniquely compelling factual context, that of a chronically mentally ill defendant. The court below held that such statements could be used for impeachment purposes under Harris v. New York, 401 U.S. 222 (1971), on the theory that they were only the fruit of a violation of Miranda v. Arizona, 384 U.S. 436 (1966). Moreover, it held that whatever harm was occasioned by this cross-examination was not of constitutional dimension, but was, at most, objectionable as beyond the scope of direct.

In concluding that this case was governed by Harris, the court below erred in three critical ways. First, statements obtained during a court ordered psychiatric examination in the absence of warnings and a voluntary waiver are not the result of a mere Miranda violation; they are coerced, involuntary statements in the truest sense. This is particularly true in the context of a mentally debilitated defendant. As such, they cannot be used for impeachment. New Jersey v. Portash, 440 U.S. 450 (1979). Second, because of petitioner's debilitated mental state and the coercive nature of the questioning, his inherently unreliable statements could not be used for impeachment because they lacked the indicia of trustworthiness relied on in Harris. Mincey v. Arizona, 437 U.S. 385 (1978). Finally,

the statements could not have been admissible as proper impeachment under Harris if, as the court below held, they were beyond the scope of the petitioner's direct testmony.

A. The Use of Petitioner's Statements to Impeach Him Is Prohibited by New Jersey v. Portash and Mincey v. Arizona

In Harris, the Court held that statements made to the police in the absence of Miranda warnings could be used for impeachment, "provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224. "In Harris ..., the Court expressly noted that the defendant made 'no claim that the statements made to the police were coerced or involuntary.'" Portash, 440 U.S. at 458 (quoting Harris, 401 U.S. at 224). This case presents the question of the constitutionality of the use of statements that fail to meet either of the Harris caveats.

In Portash, the statements to be used for impeachment were first made before a grand jury under subpoena and a grant of immunity. The Court distinguished Harris, holding that:

> The Fifth and the Fourteenth Amendments provide that no person "shall be compelled in any criminal case to be a witness against himself." As we reaffirmed last Term, a defendant's compelled statements, as opposed to statements taken in violation of Miranda, may not be put to any testimonial use whatever against him in a criminal trial. "But any criminal trial use against the defendant of his involuntary statement is a denial of due process of law."

Portash, 440 U.S. at 459 (quoting Mincey, 437 U.S. at 398) (emphasis in original).

In Portash, the Court barred the use of compelled statements for impeachment even if they were reliable. 440 U.S. at 459 ("The Fifth and Fourteenth Amendments provide a privilege against compelled self-incrimination, not merely against unreliable self-incrimination"). In Mincey, the Court decided the easier question: whether

statements that are truly involuntary and, thus, inherently unreliable may be used for impeachment. In Mincey, the Court held that a defendant could not be impeached with his prior inconsistent statements when they were obtained from him after Miranda warnings but in the absence of a waiver while he was in a hospital bed in critical condition. As noted above, the Court held that "any criminal trial use against a defendant of his involuntary statement is a denial of due process...." 437 U.S. at 398 (emphasis in original). It reversed the Arizona Supreme Court's holding that Mincey's statement was admissible as impeachment under Harris. It noted that: "Statements made by a defendant in circumstances violating Miranda v. Arizona, supra, are admissible for impeachment if their 'trustworthiness ... satisfies legal standards.'" Id. (quoting Harris, 401 U.S. at 224). Since, however, it found that "Mincey's statements to Detective Hust were not '"the product of a rational intellect and a free will,"' ... his conviction cannot stand." Id., 437 U.S. at 397-98 (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960)).

Petitioner's statements in this case were compelled, involuntary, and unreliable. Thus, they were not admissible as impeachment under Harris. Here, the statements that formed the basis of the cross-examination were coerced in the truest sense, since the petitioner was examined by the doctors pursuant to a court order. This was recognized quite clearly in Estelle v. Smith itself. There, the Court held that

> when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to [the doctor] were not "given freely and voluntarily without any compelling influences...."

451 U.S. at 469. The degree of compulsion is inescapably greater here; Booker had a long history of mental illness and, thus, was significantly less able to resist the compulsion of the

court order and the intrusive inquisitiveness of a psychiatric examination.

Petitioner Booker's statements fall in the same category as Mincey's. Booker may not have been as "debilitated and helpless" as Mincey was physically. But to place a person of Booker's chronically debilitated mental condition under court order to talk to a psychiatrist and then say that his statements were "the product of a rational intellect and a free will" is to deny reality. See Blackburn v. Alabama, 361 U.S. 199, 207-208 (1960). As the Court noted in Blackburn,

> a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion.

Id. That sense of justice should be revulsed if a human being were to be sent to his death on that basis.

The record, moreover, provides adequate corroboration of the unreliability of Booker's statements when given under coercive or difficult conditions. Placed under oath and subjected to hostile cross-examination, Booker "freely" admitted to fifteen Article 15's while in the service. In fact, however, he had only one. Similarly, when under court order, he told the psychiatrist of several violent assaults while in Okinawa. But none is confirmed in his military record.

In sum, the court below erred in applying Harris. Under Mincey, the impeachment use of petitioner's involuntary and unreliable statements requires reversal. Even if petitioner's statements are somehow not deemed unreliable, Portash requires reversal

because the use of petitioner's compelled statements violates the plain terms of the fifth amendment.

B. The Cross-Examination that Occurred in this Case is not Sanctioned by Harris

The court below held that the cross-examination did not rise to the level of a constitutional violation, that the questions relating to the alleged events on Okinawa were objectionable merely as outside the scope of direct. But if that is so, then that portion of the cross-examination cannot possibly be justified under Harris.

The Harris doctrine rests on the premise that: "The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 401 U.S. at 226. But that is not what occurred here. By conceding that the cross-examination relating to the alleged Okinawa incidents was outside the scope of direct, the court below necessarily conceded that the cross-examination was not used to impeach any attempted perjury. Rather, it was used in a plain, old fashioned attempt to prejudice the jury by impeachment relating to prior bad acts.

The court below simply missed the well established distinction that:

> It is derogative of the search for truth to allow a defendant to tell his story of innocence without facing him with evidence impeaching that story. A basic premise of our adversary system of justice is that the truth is best obtained by requiring a witness to explain contrary evidence if he can. As we have seen, for this reason the defendant who chooses to testify waives his fifth amendment privilege with respect to relevant cross examination. This is not to say that merely by taking the stand a defendant opens himself to the introduction of evidence that is relevant solely to his propensity to commit bad acts or crimes.

United States v. Beechum, 582 P.2d 898, 909 (5th Cir. 1978) (en

banc) (emphasis added).[4/] This is the clear purport of United States v. Nobles, 422 U.S. 225, 240 (1975), that a witness only waives the "privilege to resist cross-examination on matters reasonably related to those brought out in direct examination." Id. The privilege is only waived vis-a-vis "proper questioning," United States v. Havens, 446 U.S. 620, 627 (1980); the Harris rule can only apply "to questions put to him on cross-examination that are plainly within the scope of the defendant's direct examination." Id. Since the defendant did not open the issue of his propensity for violence on direct, the cross-examination had nothing to do with truthfulness or the combating of perjury. It was, simply, the prejudicial use of prior bad acts to attack the witness's credibility. Not only does such cross-examination impermissibly trench on the fifth amendment privilege, it also violates due process by placing before the jury information regarding prior bad acts that is not truly probative of the issues before it but is, nevertheless, highly prejudicial. See discussion, infra, Point II.

II. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE PRESENTATION BY A PROSECUTOR OF A CAPITAL DEFENDANT'S ALLEGED PRIOR BAD ACTS AS AN AGGRAVATING CIRCUMSTANCE DEPRIVES THE CAPITAL DEFENDANT OF THE RELIABLE SENTENCING PROCEDURES REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS

The court below held that the presentation of this unreliable evidence did not create any harm of a constitutional dimension. But allowing the prosecutor to adduce this evidence and then present it as an aggravating factor did destroy the "procedures that are designed to assure reliability in sentencing determinations." Barclay,

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4/ In Beechum, the court held that the cross-examination was proper because it related to matters that tended to show that the defendant's testimony on direct that he had no intent to commit the crime was not credible. Id.

51 U.S.L.W. at 5211 (Stevens, J., concurring). In Barclay and Zant v. Stephens, ___ U.S. ___, 51 U.S.L.W. 4891 (June 22, 1983), the Court upheld death sentences that were based on improper factors that, nevertheless, "plausibly described aspects of the defendant's background that were properly before the jury and whose accuracy was unchallenged." Stephens, 51 U.S.L.W. at 4897-98; Barclay, 51 U.S.L.W. at 5210. Here, however, the improper factor placed before the sentencer was improperly adduced and, in any case, substantially unreliable.

As indicated above, petitioner's alleged prior bad acts were either improperly adduced in violation of the fifth amendment or, as the court below concluded, as cross-examination outside the scope of direct. Thus, this case starts off on quite different footing than either Barclay or Stephens. Moreover, unlike Barclay or Stephens, the source of the information concerning the petitioner's alleged prior acts of violence was not ordinarily reliable prior convictions. Rather, the source was statements he made while under psychiatric examination and possible mental illness; the unreliability of these statements stems both from the involuntary nature of the admissions and the unreliable nature of the source, the chronically mentally ill petitioner. Indeed, these statements about crimes committed in the Army are not borne out by his service record; a fact that the jury that rendered petitioner's death sentence never knew.

The court below nevertheless concluded that petitioner was not harmed because, in part, the jury had been instructed to consider only statutory aggravating circumstances. This conclusion cannot stand for three reasons.

First, as noted above, the prosecutor expressly invited both the jury and the judge to consider these alleged prior acts of

violence as an aggravating factor. Second, the record supports the the inference that they were affected by this information. S.P. 24-25, 25-26. Indeed, even the prosecutor admitted that, while he thought the jury was more impressed with other evidence, this matter did tend to weigh in aggravation. Id. at 39-40.

Third, the fact that the jury was told to consider only the statutory circumstances in aggravation in the weighing part of the process does not diminish the harm that this unreliable evidence created. The court below declined "to posit a per se rule" of harm based on the introduction of such evidence which would "presume that the jury did not follow the court's instructions...." 703 F.2d at 1259. But in assuming that the jury is restricted to only the statutory factors -- either as a matter of law or practice, the court below misconceived the dynamics of the sentencing process. "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment." California v. Ramos, ___ U.S. ___, 51 U.S.L.W. 5220, 5225 (July 6, 1983). This is Justice Stevens's "third stage" in the sentencing process. Barclay, 51 U.S.L.W. at 5212 n. 3. Given the open-ended nature of the deliberative process, the presumption of no error indulged by the court below, 703 F.2d at 1259, is particularly inappropriate.

Mindfull that "although not every imperfection in the deliberative process is sufficient, even in a death case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim...," Stephens, 51 U.S.L.W. at 4897, petitioner respectfully submits that the Court should grant the writ to determine whether the deliberate presentation of such unreliable evidence as an aggravating factor violates

the "need for reliability in the determination that death is the appropriate that death punishment in" this case. Id. (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER INSTRUCTIONS TO THE JURY AT THE SENTENCING PHASE THAT A REASONABLE JUROR MIGHT WELL HAVE UNDERSTOOD TO LIMIT HIM OR HER TO ONLY THE STATUTORY MITIGATING FACTORS VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

This question is substantially the same as that presented in the petition for certiorari in Ford v. Strickland, No. 82-6923, filed on June 14, 1983. Accordingly, petitioner will not burden the Court with a repitition of the reasons for granting the writ. Petitioner respectfully requests the Court to review the arguments set out in Ford in support of Booker's petition.

One additional point bears mentioning. In their concurring opinion in Barclay, Justices Stevens and Powell seem to acknowledge that prior to the Florida Supreme Court's opinion in Songer v. State, 365 So.2d at 700, Florida law prohibited the consideration of nonstatutory mitigating factors at the second third or any other stage. 51 U.S.L.W. at 5212 (citing Cooper v. State, 336 So.2d at 1142). The plain language of Cooper confirms this, the post-Lockett opinion in Songer notwithstanding. In Cooper, the Florida Supreme Court affirmed the refusal of a proffer of nonstatutory mitigating evidence on the following basis:

> The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. ... [T]he Legislature chose to list the mitigating circumstanes which it judged to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and we are not free to expand the list.

Cooper, 336 So.2d at 1139 (quoting State Dixon, 283 So.2d 1, 7 (Fla. 1973)).

IV. THE FLORIDA SUPREME COURT'S SECRET, EX PARTE SOLICITATION, RECEIPT, AND CONSIDERATION OF REPORTS FROM STATE EXECUTIVE AGENCIES CONCERNING CAPITAL LITIGANTS WHOSE APPEALS WERE THEN PENDING FOR SENTENCING REVIEW PRESENT VITAL CONSTITUTIONAL QUESTIONS WHICH SHOULD BE RESOLVED BY THIS COURT

Again, this question is the same as that presented in the petition in Ford v. Strickland, No. 82-6923, and petitioner respectfully requests the Court to consider the reasons offered in support of the granting of the writ in Ford as if fully set out herein.

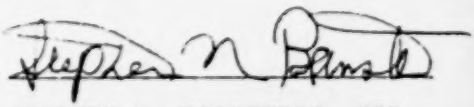
It should be pointed out, however, that the recent opinions of the Court in Barclay on the operation of the Florida statute bear significantly on the Brown issue as presented in Ford and Booker. In upholding the death sentence in Barclay despite the consideration of improper factors, both the plurality and concurring opinions relied on the role of the Florida Supreme Court in reviewing such sentences as an important safeguard. The plurality canvassed the Florida case law and concluded that "the Florida Supreme Court does not apply its harmless error rule in an automatic or mechanical fashion ... [but] examine[s] the balance struck by the trial judge...." 51 U.S.L.W. at 5211. The concurring opinion quoted this Court's understanding in Proffitt v. Florida, 428 U.S. 242 (1976), that "the evidence of aggravating and mitigating circumstances is reviewed and reweighed by the Florida Supreme Court 'to determine independently whether the imposition of the ultimate penalty is warranted.'" 51 U.S.L.W. at 5215 (quoting Proffitt, 428 U.S. at 253, and Songer v. State, 322 So.2d 481, 484 (1975)). But the conception of the role of the Florida Supreme Court in reviewing death sentences considered by the Eleventh Circuit in Ford and the Florida Supreme Court itself in Brown in upholding the ex parte practice now under challenge is diametrically opposed to the conception of that role held by this Court, reached only after studying the Florida case law.

Plainly, the receipt and consideration of sensitive, ex parte reports by the Florida Supreme Court could have and would have had a material impact on that court's role as a reweigher and reviewer of death sentences. That is particularly true in a case such as this where the defendant's mental state was relevant to two issues under consideration by that court: the cross-examination issue and the question whether there were any mitigating circumstances to be considered as part of the harmless error analysis under Elledge v. State, 346 So.2d 998, 1002-03 (Fla. 1977). Booker v. State, 397 So.2d at 913-14, 918. Equally plainly, it violated the Constitution. "Because of the potential that the [re]sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliablity in capital sentencing dictate[s] that the death penalty be reversed." Ramos, 51 U.S.L.W. at 5224 (describing Gardner v. Florida, 430 U.S. 349 (1977)) (emphasis added).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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Counsel for Petitioner

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83-5207

NO. ~~82-5460~~

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

STEPHEN TODD BOOKER,

Petitioner,

vs

LOUIE WAINWRIGHT,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, STEVEN TODD BROOKER, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the Petitioner, who is presently incarcerated at the Florida State Penitentiary, Starke, Florida. Mr. Brooker's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

STEPHEN N. BERNSTEIN, ESQ.
609 NE First Street
Post Office Box 1642
Gainesville, Florida 32602
(904) 373-9555
Attorney for Petitioner

83-5309

RECEIVED
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SUPREME COURT, U.S.

NO. ~~82-5468~~

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

STEPHEN TODD BOOKER,

Petitioner,

vs

AFFIDAVIT

LOUIE WAINWRIGHT,

Respondent.

STATE OF FLORIDA:
COUNTY OF ALACHUA:

BEFORE ME, the undersigned authority, personally appeared STEPHEN N. BERNSTEIN, who, being duly sworn upon oath states:

1. I am an attorney for Stephen Todd Booker, the Petitioner in the above captioned action, and I make this affidavit in support of Mr. Brooker's Motion for Leave to Proceed in Forma Pauperis. My representation of Mr. Booker is without remuneration.

2. Mr. Booker is presently in the custody of the State of Florida and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Booker by me and will be forwarded to the Court immediately upon receipt. A copy of the Affidavit to be signed by Mr. Booker is attached hereto.

3. Counsel was appointed to represent Mr. Booker at his trial and on appeal.

4. I am informed and believe that because of his poverty, Mr. Booker is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Booker is entitled to redress in this action.

STEPHEN N. BERNSTEIN

SWORN TO AND SUBSCRIBED before me this 5th day of August, 1983.

Notary Public, State
of Florida at Large

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXPIRES AUG 11, 1986
BONDED THRU GENERAL INS. UNDERWRITERS

RECEIVED
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SUPREME COURT, U.S.

No. 82-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

STEPHEN TODD BOOKER, :

Petitioner, :

v. :

LOUIE L. WAINWRIGHT, Secretary Florida Department of Corrections, :

Respondent. :

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

STATE OF FLORIDA)
) ss:
COUNTY OF BRADFORD)

I, Stephen Todd Booker, being duly sworn, depose and say in support of my motion for leave to proceed without being required to prepay fees or costs and to proceed in forma pauperis:

1. I am the petitioner in the above noted action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration. At trial and on appeal, I was represented by appointed counsel because I am indigent.

5. I believe I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Circuit Court of Alachua County, a trial court of the State of Florida, of murder and was sentenced to death. I am being held at the Florida State Prison at Starke, Florida. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

_____
STEPHEN TODD BOOKER

STATE OF FLORIDA
COUNTY OF BRADFORD

The foregoing affidavit of Stephen Todd Booker was subscribed and sworn before me this ____ day of _____, 1983.

_____
Notary Public

Stephen Todd BOOKER, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida, Respondent.

No. 82-5468.

United States Court of Appeals, Eleventh Circuit.

April 25, 1983.

Petitioner appealed from an order of the United States District Court for the Northern District of Florida, Lynn C. Higby, J., which denied his petition for habeas corpus relief. The Court of Appeals, Fay, Circuit Judge, held that: (1) where state court did not make explicit whether it was considering federal constitutional provision or its state constitutional counterpart, and cited cases construing both, federal habeas court would view the state court as having treated the issue as to whether petitioner's privilege against self-incrimination was violated by prosecutor's use of information derived from a psychiatric examination as arising under both federal and state law for *Sykes* purposes, and (2) in murder trial, prosecutor's use of information derived from a psychiatric examination of petitioner for purposes of impeaching his testimony during penalty phase did not violate his constitutional right against self-incrimination.

Affirmed.

1. Habeas Corpus ⇐45.3(1)

When state courts do not indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for state by entertaining the claim.

2. Habeas Corpus ⇐45.3(1)

Where state court did not make explicit whether it was considering federal constitutional provision or its state constitutional counterpart, and cited cases construing both, federal habeas court would view the state court as having treated the issue as to whether petitioner's privilege against self-incrimination was violated by prosecutor's use of information derived from a psychiatric examination as arising under both federal and state law for *Sykes* purposes. U.S.C.A. Const.Amend. 5; West's F.S.A. Const. Art. 1, § 9.

3. Witnesses ⇐301

Neither accused's mere submission to a psychiatric or psychological examination, nor fact that his counsel may have requested an examination foreclosed his claim that his constitutional privilege against self-incrimination was violated by prosecutor's use, in cross-examining accused, of information allegedly gained from his psychiatric examination. U.S.C.A. Const.Amend. 5.

4. Witnesses ⇐300

In murder trial, prosecutor's use of information derived from a psychiatric examination of accused for purposes of impeaching his testimony during penalty phase did not violate his constitutional right against self-incrimination. U.S.C.A. Const.Amend. 5.

5. Habeas Corpus ⇐85.1(2)

Federal habeas court would presume that jury in petitioner's murder trial followed trial court's instructions listing the aggravating circumstances and specifically

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limiting jury's consideration to those circumstances rather than invalidating imposition of death penalty on basis that introduction of evidence of petitioner's prior acts of violence might have been interpreted as a nonstatutory aggravating circumstance upon which jury relied.

6. Habeas Corpus ⇐85.5(8)

Petitioner failed to carry his burden of establishing that trial court's instructions to jury during advisory sentencing proceedings improperly limited jury's consideration of nonstatutory mitigating factors in deciding whether to recommend life or death.

7. Criminal Law ⇐1128(4)

Florida Supreme Court's solicitation of ex parte psychological material concerning petitioner in reviewing his murder conviction was not unconstitutional.

Appeal from the United States District Court for the Northern District of Florida.

Before FAY and VANCE, Circuit Judges, and ALLGOOD *, District Judge.

FAY, Circuit Judge:

Stephen Todd Booker appeals the district court's denial of his petition for habeas corpus challenging his sentence of death imposed pursuant to Florida Statute Section 921.141 (1977). On appeal, Booker advances four contentions: 1) the prosecutor's use of information derived from a psychiatric examination in cross examination of Booker during the penalty phase violated his fifth amendment rights; 2) the prosecutor's introduction of evidence concerning Booker's prior acts of violence permitted the jury to consider a nonstatutory aggravating circumstance; 3) the state trial court improperly limited the jury's consideration of nonstatutory mitigating factors; and 4) the Florida Supreme Court's solicitation of ex parte psychological material concerning Booker was unconstitutional. After a careful consideration of Booker's claims on appeal, we affirm the denial of the petition for habeas corpus.

I. FACTUAL BACKGROUND

Booker was convicted on June 19, 1978 in the state court of first degree murder, sexual battery and burglary based upon evidence which showed that Booker entered the Gainesville, Florida apartment of Lorine DeMoss Harman, a ninety-four year old woman, raped Harman and stabbed her repeatedly in the chest and neck causing her death. Booker was connected to the crime by body hair samples, fingerprints, and testimony concerning the print pattern of his shoes. Further, Booker "confessed" to a Gainesville police detective. This "confession" occurred while Booker was describing himself in the third person as Steve and calling himself "Aniel," which he spelled out for the detective and described as a demon.[1] While Booker was "Aniel,"

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

1. The detective explained Booker during this time as follows:

> Prior to the time that he became Aniel he would chant. And the chanting would go on for perhaps ten seconds, 15 seconds, not long. It was during this time that the glassy eyes appeared. He had the glassy eye appearance. He would then settle, be serene, smile, and in my terminology clench his teeth. The grinding would stop, but his teeth would clench, and in that form he would begin to whisper things that I had to lean forward to hear.

the detective asked him if "Stephen had done it," and Booker replied, "He did it, God damn it, he did it." There is no contention that the confession was involuntary and in fact, its substance was adduced during cross examination of the detective by Booker's attorney.

After Booker was duly indicted by the grand jury and a public defender appointed to represent him, defense counsel filed a motion for mental examination and notice of defense of insanity. (State Record at 4). A county judge granted the motion, committing Booker to an intake facility of the Department of Health and Rehabilitative Services to determine whether he was competent to participate in his own defense and appointing Jose Lineas, M.D. and George Barnard, M.D. to examine Booker as to his sanity or insanity at the time of the offense. (State Record at 9). Thereafter, both the state and defendant filed separate motions to appoint an additional psychiatrist to examine Booker on the grounds that the previously appointed doctors were unable to reach a conclusion regarding Booker's sanity at the time of the offense. (State Record at 32, 36). The state court appointed Dr. Frank Carrera to examine Booker. (State Record at 45). Dr. Carrera testified during the defendant's case and Dr. Barnard testified during the state's rebuttal case.

The case was submitted to the jury after three days of trial proceedings. The jury deliberated for slightly in excess of three hours and returned verdicts of guilty on all three counts. The next day, the advisory sentencing proceedings occurred.[2] The only evidence introduced by the state at this time was a document relating to Booker's prior conviction for robbery. The only evidence[3] introduced by the defense was the testimony of Booker. Booker also made a statement prior to counsel's arguments on sentencing.[4] After hearing counsel's arguments and receiving the trial judge's instructions, a majority[5] of the jurors recommended the death sentence.

In October 1978, the trial judge had before him a presentence investigation re-

> As my questioning related toward Aniel and who Aniel was, how he became acquainted with Aniel, and so on, as my questions grew more direct, he would burst into tears and cry. And he would laugh and wipe his tears from his eyes in a split second. He would then settle back in the chair, face me again, and be in a word, calm. He was rational in all aspects. Nothing was not understandable with the exception of the chant.
> (Transcript of Trial Proceedings, Vol. IV., p. 627).

2. Pursuant to Fla.Stat. Section 921.141 (1977), the court was required, upon the defendant's conviction of a capital felony, to conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. After hearing all the evidence, the jury deliberates and renders an advisory sentence to the court of either death or life imprisonment.

3. The jury, however, is not restricted to evidence presented during the penalty phase in arriving at its advisory sentence and may consider evidence presented throughout the trial.

4. Booker, against the advice of his attorney, made the following statement to the jury:

> You people in the jury box have convicted me of first degree murder, sexual battery, and burglary. And you are going in the room and deliberate over what punishment should be given for a crime of this nature. A defendant found guilty of such a crime should receive the death penalty. That's it.
> (Transcript of Trial Proceedings, Vol. V., p. 850).

5. Unlike the verdict, the advisory sentence of the jury need not be unanimous. Fla.Stat. Section 921.141(3) (1977). The jury considering Booker's sentence voted nine to three to impose the death sentence. (Transcript of Trial Proceedings, Vol. V., p. 886).

port, the psychological report of Dr. Elizabeth MacMahon, certain medical records, a letter from Booker and the sentencing memoranda of counsel, as well as the recommendation of the jury and the oral arguments of counsel. The trial judge considered the statutory aggravating and possible mitigating factors and sentenced Booker to death for the murder of Lorine DeMoss Harman,[6] entering his written order in accordance with Fla.Stat. Section 921.141(3) (1977). (State Record at 142). *See also, Booker v. State*, 397 So.2d 910, 915–918 (Fla.1981).

Booker appealed to the Florida Supreme Court which affirmed the conviction and sentence. *Booker v. State*, 397 So.2d 910 (Fla.), *cert. denied*, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981). Booker also joined 122 other death row inmates in petitioning the Florida Supreme Court for extraordinary relief based on that court's possible consideration of extra-record psychological material in affirming the sentences. The Florida Supreme Court denied relief, *Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981), and the United States Supreme Court denied certiorari, *Brown v. Wainwright*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

On March 22, 1982, the Governor of Florida signed a death warrant authorizing Booker's execution by electrocution on April 21. On April 13, Booker filed a petition for writ of habeas corpus in the district court for the Northern District of Florida, alleging various grounds for relief and including a prayer for stay of execution. The district court denied the stay orally on April 15 and by a summary order on April 19. (Record at 260). The district court filed its order denying petition for writ of habeas corpus on April 20. (Record at 261). Booker filed a notice of appeal and an application for certificate of probable cause and to proceed on appeal in forma pauperis (Record at 260), as well as an order denying Booker's application for certificate of probable cause and to proceed on appeal in forma pauperis (Record at 273). In any event, appeal was taken to the Eleventh Circuit, which issued an order granting stay. *Booker v. Wainwright*, 675 F.2d 1150 (11th Cir.1982).[7] We now consider the merits of Booker's claims on appeal.

II. USE IN CROSS EXAMINATION OF PSYCHIATRIC EXAM INFORMATION

A. The Procedural Bar

On this appeal, Booker claims that his privilege against self incrimination was violated when the prosecutor utilized information during cross examination of Booker's penalty phase testimony which was derived from a psychiatric examination. Booker contends that since the constitutional protections mandated by *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), were not afforded Booker, his death sentence must be vacated.

6. The trial judge also sentenced Booker to a fifty-five year term for sexual battery and to a thirty year term for burglary, both sentences to run consecutively.

7. The Eleventh Circuit panel noted:

> In the limited time available to this court to examine the procedure, it is unclear whether or not the district judge granted or denied petitioner's application for certificate of probable cause to appeal, there being in the papers furnished to us what appears to be an order granting same and another order of denial, both dated April 19, 1982. Petitioner alleges that the certificate of probable cause was denied.

675 F.2d at 1151.

The state, however, argues that we are barred from considering the merits of Booker's *Estelle v. Smith* claim in a habeas proceeding pursuant to 28 U.S.C. Section 2254 by the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In *Sykes*, the United States Supreme Court held that a habeas corpus petitioner must show "cause and prejudice" in order to advance in federal court those claims barred from consideration in the state courts by a valid procedural rule. The United States Supreme Court recently reaffirmed the *Sykes* doctrine in *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), recognizing that the costs of the federal writ of habeas corpus "are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts." 456 U.S. at 128, 102 S.Ct. at 1572.

The state argues that Booker's counsel did not adequately object at trial. During oral argument on this appeal, Booker's counsel, who has represented Booker throughout the state and federal proceedings, argued that the objection at trial was sufficient. Both parties also devoted considerable attention in their respective briefs to the "cause and prejudice" exception to *Sykes*.

[1] One rationale for the *Sykes* doctrine is the integrity of the state court trial. "The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Sykes*, 433 U.S. at 90, 97 S.Ct. at 2508. However, equally important underpinnings of the *Sykes* doctrine are considerations of comity and federalism. As recently stated in *Isaac*, without *Sykes'* requirement that defense counsel present constitutional claims during trial, the state appellate courts would not have a "chance to mend their own fences and avoid federal intrusion." *Isaac*, 456 U.S. at 129, 102 S.Ct. at 1572.

Considerations of comity and federalism have resulted in the development of a well settled exception to the procedural default rule of *Sykes:* where a state appellate court does not rely on a procedural default, but reaches the merits of the federal law claim, the *Sykes* bar is inapplicable. As explained by the United States Supreme Court, when the state courts do not indicate that a "federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." *County Court of Ulster County v. Allen*, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979). The former Fifth Circuit recognized this exception and applied it in numerous cases.[8] *See e.g., Sassoon v. Stynchombe*, 654 F.2d 371, 374 (5th Cir.1981); *Moran v. Estelle*, 607 F.2d 1140, 1142 (5th Cir.1979); *Cannon v. State of Alabama*, 558 F.2d 1211, 1216 n. 12 (5th Cir.1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978).

[2] The state contends that Booker did not adequately object at trial or present his federal constitutional claim on appeal to the Florida Supreme Court. The state further contends that no exception is applica-

8. We are bound by the precedent of the former Fifth Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981).

ble because "it is clear from the Florida Supreme Court's opinion that this issue was treated as a question of state evidentiary law rather than a federal constitutional question." (Brief of Appellee at 20, n. 3). We do not agree.

The Florida Supreme Court described Booker's position on appeal thusly:

> The defendant contends that during the sentencing proceedings the court committed error in permitting the prosecutor to ask questions based on information gathered from court ordered psychiatric reports. The defendant argues that this violated his right against self-incrimination.

397 So.2d at 913. The Florida Supreme Court also noted that:

> The defendant recognizes that a court ordered psychiatric examination generally is not considered violative of defendant's right to freedom from compelled self-incrimination [9] and that psychiatrists may render opinions concerning sanity based on factual statements made by the defendant.

Id. In both the above references to the right against self incrimination, the right is referred to generally, without denominating whether it is specifically the right embodied in the Fifth Amendment to the United States Constitution or Florida Constitution, Article 1, Section 9. Booker's Initial Brief to the Florida Supreme Court mentions both sources *initially* and then refers to the right generally. In deciding the dispositive issue, the Florida Supreme Court concluded:

> A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him. *Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968).

397 So.2d at 914. By relying on *Harrison*, which did not concern Florida's privilege against self-incrimination,[10] the Florida Supreme Court was apparently considering both the state and federal constitutional privileges against self-incrimination. We therefore conclude that where a state court does not make explicit whether it is considering the federal constitutional provision or its state constitutional counterpart, and cites cases construing both, we will view the state court as having treated the issue as arising under both federal and state law for *Sykes* purposes. To hold otherwise would be to sanction an imprecision in jurisprudence intolerable in the realm of constitutional issues and to foreclose federal habeas review of federal claims because the language used by the state courts was vague.

Having decided that we are not barred by the procedural default doctrine of *Sykes*, we proceed to consider Booker's claim concerning the use of the psychiatric exam on the merits.

B. The Substantive Claim

Booker asserts that under *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68

9. This was the state of the law prior to *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

10. Harrison was convicted of murder in the District of Columbia and the Court was construing the Fifth Amendment to the United States Constitution.

L.Ed.2d 359 (1981), his constitutional privilege against self-incrimination was violated by the prosecutor's use of information allegedly gained from a psychiatric examination of Booker. In *Smith*, the United States Supreme Court held that

> when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to [the doctor] were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the state did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them.

Id. at 469, 101 S.Ct. at 1876. There is no contention that Booker was given *Miranda* or other suitable warnings before making statements to the psychiatrists who examined him.

[3] Neither Booker's mere submission to a psychiatric or psychological examination, nor the fact that the defense may have requested an examination forecloses his claim under *Smith*. *Battie v. Estelle*, 655 F.2d 692, 702 (5th Cir.1981). In *Battie*, however, the former Fifth Circuit distinguished a situation where the government used the results of a court-appointed psychiatric examination only after the defense had introduced psychiatric testimony in order to raise a mental defect defense, *citing*, *United States v. Cohen*, 530 F.2d 43 (5th Cir.) *cert. denied*, 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976).[11] *Battie* approved *Cohen's* holding that "the introduction by the defense of psychiatric testimony constituted a waiver of the defendant's fifth amendment privilege in the same manner as would the defendant's election to testify at trial." *Battie*, 655 F.2d at 702.

[4] In Booker's case, the issue of insanity was raised as a defense and a psychiatrist testified on behalf of the defendant. Thus, under *Battie*, there was a waiver of defendant's fifth amendment privilege as to psychiatric testimony. However, the jury had already rejected Booker's defense of insanity by finding him guilty on all three counts of the indictment and the use of the psychiatric testimony occurred during the subsequent penalty phase of the trial. We need not decide whether such a waiver under *Battie* during trial survives in the separate penalty proceeding in a capital case, since there is another determinative factor in Booker's situation.

Booker took the stand to testify during the advisory sentencing proceedings of the state trial. In answer to his attorney's specific inquiry as to whether he had a recollection of the day of the crime, Booker said he did not remember. Booker also testified that he had been in various hospitals, including Camp Codie Medical Center on Okinawa and Walter Reed Medical Center in Washington, D.C. while he was in the armed services. The following colloquy then occurred between Booker and his attorney:

11. Writing five years prior to *Estelle v. Smith*, the Fifth Circuit in *Cohen* stated

> [w]e have never reached the issue of whether a defendant's privilege against self-incrimination is violated per se by a court ordered psychiatric examination solely to determine the accused's mental condition at the time of the commission of the offense. Several other circuits have rejected this unconstitutionality-per-se argument on various grounds, while one has indicated approval of it. Relying on a balancing test, we choose to follow the former line of cases and permit compelled psychiatric examinations when a defendant has raised the insanity defense. [footnotes omitted].

530 F.2d at 47.

Q: Have you had any difficulties during this time you were hospitalized from the time you were 13 until now with periods of time which you can't remember?

A: Yes, sir. Three of these occasions of hospitalization, that was the reason for being in the hospital.

Q: That you couldn't remember what had happened to you?

A: Yes, sir.

(State Transcript at 838). On cross examination, the prosecutor questioned Booker about his military service:

Q: Do [sic] you have problems with acts of violence while you were in the service?

A: Yes. I did.

Q: Other than these for fighting, have you ever attempted to kill people?

Q: While you were in Okinawa in the houses?

A: Could be.

Q: Do you know what I am talking about, Mr. Booker?

A: Yes.

Q: I'm talking about houses of prostitution. Did you ever try to kill anybody over there?

A: Not necessarily. I used to—we used to rob cat houses.

Q: What weapons did you use to hit people with?

A: Claw hammer.

Q: How many people do you think you hit with the claw hammer?

A: I can't recollect.

Q: More than five?

A: I would say about five.

Q: More than ten?

A: No.

(State Transcript at 841–42). Later, Booker's attorney objected to the prosecutor's questions relating to the day of the crime. The trial court overruled the objection on the grounds that the question of lapse of memory on the day of the incident was opened by the defendant on direct. The cross examination continued:

Q: Mr. Booker, my question to you was do you remember when you got up at 7:00 or 7:30 feeling that morning like you wanted to kill somebody?

A: Part of the way, yes.

Q: Did you know Mrs. Harman prior to this date?

A: No. I didn't.

Q: Had she ever done anything to you in her life to deny you anything or prevent you from anything?

A: No. In regards to me knowing her, I still don't know her. I have just been confronted with her in this courtroom in this charge.

Q: Did you attempt to kill anybody else that day; do you remember that?

A: Sure, I remember.

Q: Do you remember you did?

A: No. I didn't try to kill anybody that day.

Q: In the morning?

A: Right.

Q: You did not?

A: No. I didn't.

Q: Did you think about doing it?

A: Sometime I did, but I gave up the idea because it was crazy.

(State Transcript at 844–45)

Booker contends, and we assume without deciding, that the prosecutor obtained the information about the Okinawa houses of prostitution and Booker's state of mind upon waking on the day of the crime

through information given to a psychiatrist [12] without the constitutional safeguards of *Estelle v. Smith*.[13] Yet even assuming Booker's statements would not have been admissible in the state's case, there is no constitutional prohibition against using the information for impeachment purposes. *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).[14] In *Harris*, the United States Supreme Court reasoned:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. [citations omitted]. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could be laid before the jury by way of cross examination and impeachment.
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances.

401 U.S. at 225–6, 91 S.Ct. at 645–646. Since "the holding in *Smith* followed logically from the *Miranda* decision itself," *Battie* 655 F.2d at 699, it is likewise logical to conclude that the shield provided by *Smith* is also not susceptible to being perverted into a license to use perjury free from permissible impeachment.

While the prosecutor's questions concerning events on Okinawa may have been susceptible to an objection as being outside the scope of direct examination,[15] the cross examination questions do not rise to the level of a constitutional violation [16] and relief in a federal habeas action is therefore not warranted.

III. PRIOR ACTS OF VIOLENCE

[5] Booker contends that the Okinawa activities elicited on cross examination of

12. The Florida Supreme Court found that "the record does not conclusively show that the state attorney secured this information from the psychiatric reports." 397 So.2d at 914.

13. We have previously decided that *Smith* should be given retroactive effect. *Battie v. Estelle*, 655 F.2d at 699.

14. *See also, Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), (use of prearrest silence to impeach defendant does not violate privilege against self incrimination); *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980), (evidence suppressed as fruit of unlawful search and seizure may be used to impeach defendant's testimony given on cross examination).

15. The Florida Supreme Court, however, held that:

> The defendant opened up the question of what he remembered and whether he did or did not remember certain things. The trial court was correct in ruling that the state attorney had a right to inquire as to what defendant remembered, as this was an issue presented by the defendant during the sentence proceedings.

397 So.2d at 914.

16. *Cf., Harris v. Spears*, 606 F.2d 639 (5th Cir. 1979), where we affirmed the granting of the writ of habeas corpus on the basis of the prosecutor's cross examination questions to defendant concerning statements attributed by implication to defendant's son. We stated "The constitutional error occurred, however, not when the questions were asked, but when the son was not called." *Id.* at 643. In *Harris*, the sixth amendment right to confrontation was determinative, a factor not applicable in *Booker*, since what is involved is Booker's statements.

Booker during the advisory sentencing proceeding requires granting of the writ on another basis. In *Henry v. Wainwright*, 661 F.2d 56 (5th Cir.1981),[17] we held that it is constitutional error to allow a jury in a capital case to consider nonstatutory aggravating factors in deciding whether the death penalty should be imposed. Booker seeks to extend *Henry* to situations where the jury is properly instructed to consider only statutory aggravating factors but evidence of a nonstatutory aggravating factor has been presented to the jury.

To adopt Booker's theory would be to presume that the jury did not follow the court's instructions listing the aggravating circumstances and specifically limiting the jury's consideration to those circumstances. There is no hint in the record that the jury would have construed the Okinawa impeachment testimony as a nonstatutory aggravating factor. We decline to posit a per se rule to the effect that the introduction of any evidence that might *possibly* be interpreted as a nonstatutory aggravating circumstance renders the imposition of the death penalty unconstitutional notwithstanding specific instructions limiting the jury's consideration to the enumerated statutory aggravating factors.

IV. JURY INSTRUCTIONS ON NONSTATUTORY MITIGATING FACTORS

[6] Booker argues that the trial court's instructions to the jury during the advisory sentencing proceedings improperly limited the jury's consideration of nonstatutory mitigating factors. The state argues that our consideration of this issue is barred by the procedural default doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Booker concedes procedural default as to the jury instructions, but contends that he comes within the cause and prejudice exception to *Sykes*.

This issue is controlled by *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc). In *Ford*, the trial judge similarly instructed the jury to consider *only* the enumerated aggravating factors and, omitting the "only," to consider the following mitigating factors. *Ford* also conceded procedural default in *Sykes*. In *Ford*, we stated:

> The *Sykes* issue becomes blurred in this case, however, because of two principles which mesh to deny Ford relief on this point. First, the Supreme Court has held that an erroneous jury instruction satisfies *Sykes'* prejudice prong only if actual, not possible, prejudice is shown so that there is '*actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.' *United States v. Frady*, 456 U.S. 152, 168, 102 S.Ct. 1584, 1595, 71 L.Ed.2d 816, 832 (1982).
>
> Second, in evaluating a trial court's instructions, we must determine the interpretation a reasonable juror might give the words of the instruction in question. *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979). The entire charge must be

17. This Unit B case decided November 12, 1981, is binding precedent for the Eleventh Circuit. *See, Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982). *Henry* was vacated and remanded to the Eleventh Circuit by the United States Supreme Court, — U.S. —, 102 S.Ct. 2922, 73 L.Ed.2d 1326, for further consideration in light of *Engle v. Isaac*. On remand, we found that the issue was properly before us and adhered "to our earlier judgment that the state trial court committed constitutional error by allowing the non-statutory aggravating circumstances to be placed before and considered by the jury at Henry's sentencing hearing." *Henry v. Wainwright*, 686 F.2d 311, 315 (5th Cir.1982) (Unit B).

examined as a whole to discern whether the issues and law presented to the jury were adequate. *Davis v. McAllister*, 631 F.2d 1256, 1260 (5th Cir.1980), *cert. denied*, 452 U.S. 907, 101 S.Ct. 3035, 69 L.Ed.2d 409 (1981).

The fundamental issue then is whether Ford has carried his burden in establishing that his jury perceived that in deciding whether to recommend life or death, it was denied the use of any nonstatutory mitigating factors.

696 F.2d at 812. As in *Ford*, we conclude that Booker has not carried his burden in establishing the jury perceived that in deciding to recommend life or death, it was denied the use of any nonstatutory mitigating factors. *Ford* set forth four reasons for this conclusion. Three of those reasons are applicable to Booker's case and bear repeating:

> *[F]irst*, the trial court read the statute as written, setting forth the entire list of statutory mitigating circumstances, which statute omits the word 'only.' The Supreme Court has recognized the Florida statute does not limit a jury's consideration of mitigating circumstances to those listed in the statute. *Proffitt v. Florida*, 428 U.S. [242] at 250 n. 8, 96 S.Ct. [2960] at 2965 n. 8 [49 L.Ed.2d 913].
>
> *Second*, the instruction here was different from *Washington v. Watkins*, 655 F.2d 1346 (5th Cir.1981), *cert. denied*, — U.S. —, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982), where the state trial judge concluded the charge with these words:
>
> > If you unanimously find from the testimony that *one or more of the preceding elements of mitigation* exist[s], then you must consider whether *it* outweighs the aggravating circumstances you previously found and you must return one of the following verdicts....
>
> *Id.* at 1368 (emphasis added). Here the jury was not confined to two 'preceding elements of mitigation,' as in *Washington*.
>
> *Third*, that petitioner was not limited in the introduction of evidence which might be considered mitigating and that the jury arguments encompassed all evidence introduced in the case explains counsel's perception that the jury was not denied the use of any evidence in weighing sentences. Thus had petitioner known of *Lockett [v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973], he would still have no reason to object because the jury was not in fact being limited to what it could consider.

Id. at 812-13. As in *Ford*, the rational conclusion is that the jury did not perceive a restriction on the consideration of any mitigating circumstances.

V. NONRECORD MATERIAL BEFORE THE FLORIDA SUPREME COURT

[7] The final issue raised by Booker concerning the Florida Supreme Court's consideration of nonrecord material is also controlled by *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc), where we stated:

> But even if members of the [Florida Supreme] court solicited the material with the thought it should, would or might be used in the review of capital sentences, the decision of the Florida court that it should not be so used, the statement that it should not be so used, and the rejection of the notion that it affected the judg-

ment of the reviewing judges of the court ends the matter when addressed at the constitutional level.

Id. at 811. We note only that Booker's attorney was furnished with the Florida Supreme Court's request of Booker's presentence investigation report, thus rendering this factual situation even weaker than *Ford*.

VI. CONCLUSION

Based on the foregoing, the district court's denial of the petition for writ of habeas corpus is AFFIRMED.

Adm. Office U.S. Courts—West Publishing Company, Saint Paul, Minn.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) **Separate proceedings on issue of penalty.**—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) **Advisory sentence by the jury.**—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) **Findings in support of sentence of death.**—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

Pages misnumbered in original copy.

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) **Review of judgment and sentence.**—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) **Aggravating circumstances.**—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) **Mitigating circumstances.**—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Amended by Laws 1972, c. 72-724, § 9, *eff.* Dec. 8, 1972. Amended by Laws 1974, c. 74-379, § 1, *eff.* Oct. 1, 1974; Laws 1977, c. 77-104, § 248, *eff.* Aug. 2, 1977; Laws 1977, c. 77-174, § 1, *eff.* Aug. 2, 1977; Laws 1979, c. 79-353, § 1, *eff.* July 3, 1979.

Laws 1972, c. 72-724, § 9, substantially rewrote this section.

Laws 1974, c. 74-379, § 1, added the third sentence to subsec. (1).

Laws 1977, c. 77-104, a reviser's bill corrected errors and deleted obsolete or expired provisions. See Reviser's Note—1977.

Laws 1977, c. 77-174, a reviser's bill, amended this section to reflect language editorially inserted by the division of statutory revision and indexing.

Laws 1979, c. 79-353, substituted in the fifth sentence of subsec. (1) "to the nature of the crime and the character of the defendant" for "to sentence", deleted in subsecs. (2)(b) and (3)(b) "as enumerated in subsection (6)", and added subsec. (5)(i).

Reviser's Note—1977:

Conforms internal references to editorial reassignment of subsections created by s. 9, ch. 72-724, Laws of Florida.

No. 83-5209

ORIGINAL

IN THE SUPREME COURT OF
THE UNITED STATES

October Term 1982

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STEPHEN TODD BOOKER,

Petitioner,

-vs-

LOUIE L. WAINWRIGHT, Secretary
of the Florida Department of
Corrections,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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No. 83-5209

IN THE SUPREME COURT OF
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STEPHEN TODD BOOKER,

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On Petition for Writ of Certiorari
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for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Louie L. Wainwright, Secretary of the Florida Department of Corrections, respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioner in this case.

STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court of Alachua County, Florida, of the offenses of first degree murder, sexual battery, and burglary, and he received a sentence of death, and sentences of 55 years and 35 years respectively. His direct appeal to the Florida Supreme Court is reported as Booker v. State, 397 So.2d 910 (Fla.), cert. denied, 454 U.S. 957 (1981). After the Governor of Florida signed a death warrant on March 22,

1982, which ordered Booker's execution for April 21, 1982, Petitioner filed for collateral relief in the Circuit Court of Alachua County. The denial of this collateral relief was affirmed by the Supreme Court of Florida in Booker v. State, 413 So.2d 756 (Fla. 1982). Petitioner then sought federal habeas relief in the Northern District of Florida which denied Booker's Petition for Writ of Habeas Corpus on April 19, 1982. A panel of the Eleventh Circuit Court of Appeals granted a stay of execution on that date and Petitioner was permitted to file a full appeal on the merits of the district court's denial of the writ. The Eleventh Circuit Court of Appeals subsequently denied Booker's appeal in Booker v. Wainwright, 703 F.2d 1251 (11th Cir. 1983), and rehearing was denied on June 6, 1983. Booker v. Wainwright, 708 F.2d 734 (11th Cir. 1983). Mandate has been stayed pending the resolution of the Petition for Writ of Certiorari filed in this Court.

Petitioner was a member of the class of death row inmates which petitioned the Supreme Court of Florida for extraordinary relief based on that court's alleged possible consideration of extra-record psychological material during appellate review. Relief was denied by the Supreme Court of Florida, and this Court declined to review the case. Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981).

The facts as found by both the Supreme Court of Florida and the Eleventh Circuit Court of Appeals are as follows. Petitioner was convicted of murdering a 94 year old woman. The cause of death was loss of blood due to several knife wounds; two knives were found embedded in the victim's body. A pathologist located both semen and blood in the vaginal area of the victim and concluded that sexual intercourse had occurred prior to the victim's death. The victim's apartment was in a state of disarray, and Petitioner's fingerprints were positively

identified on items found in the apartment. Petitioner had a pair of boots with a print pattern similar to those seen by an officer at the scene of the homicide. Booker v. State, supra at 397 So.2d 912.

Body hairs found on the clothing of the defendant at the time of his arrest were consistent with hairs taken from the body of the victim. Petitioner confessed to a Gainesville detective, although at the time he was making the confession, Booker described himself in the third person. Through the voice of a character named "Aniel," Booker admitted that Stephen had done the crime: "He did it, Goddamn it, he did it." Booker v. Wainwright, supra, 703 F.2d 1253.

After Petitioner was indicted by the grand jury and furnished appointed counsel, Petitioner filed a Motion for Mental Examination and Notice of Defense of Insanity. Two doctors were appointed to examine Petitioner to determine his competency for trial and the state of his sanity at the time of the offense. However, neither doctor was able to make a determination of Petitioner's sanity, and both the State and the defense requested an additional psychiatrist to examine Petitioner on the ground of his sanity at the time of his offense. One of the doctors testified during the defendant's case, and the State had another psychiatrist testify during its rebuttal. Id.

After a three day trial, Petitioner was found guilty on all three counts as charged. The only evidence introduced by the State during the advisory sentencing proceedings was a document relating to Petitioner's prior robbery conviction. The only evidence introduced by the defense was Booker's testimony. During direct examination, his lawyer asked him whether he could remember certain periods in his life in which he had been hospitalized. Id. at 703 F.2d 1257. Booker testified on direct

that he could not remember what had occurred on the day of the crime, and he admitted that he had been in various hospitals while he was in the armed forces. On cross-examination, the prosecutor asked Booker whether he had had problems with acts of violence while he was in the service, and Booker admitted that he had robbed "cat houses" in Okinawa and that he had assaulted "about five" people with a claw hammer during those incidents. Id. No objection was made to these questions.

Later during the cross-examination, Petitioner's attorney objected to the State's questioning concerning what Booker could remember on the day of the crime. However, this objection was overruled because the trial court ruled that the question of Petitioner's memory on the day of the crime had been opened up by the defense on direct examination. Id. at 703 F.2d 1258.

Against the advice of his lawyer, Petitioner made a statement to the jury:

> You people in the jury box have convicted me of first degree murder, sexual battery, and burglary. And you are going in the room and deliberate over what punishment should be given for a crime of this nature. A defendant found guilty of such a crime should receive the death penalty. That's it.

Id. at 703 F.2d 1254, n.4.

In his sentencing order, the trial court indicated that he had considered the evidence adduced at trial, the sentencing trial, the argument of counsel for the respective parties, the pre-sentence investigation, a psychological report prepared by a Dr. Elizabeth McMahon, which had been requested by the defense, a letter from the Petitioner, sentencing memoranda from counsel of record, and the jury's recommendation. A copy of the Judgment and Sentence has been included in the Appendix to this brief. In aggravation, the trial court found that Petitioner had previously been convicted of a felony involving violence, the murder was

committed while Petitioner was engaged in the commission of burglary and rape, the murder was committed for the purpose of preventing an arrest, and that the murder was especially heinous, atrocious or cruel. See §§921.141(5)(b), (d), (e), and (h), Fla. Stat. No statutory mitigating circumstances were found, but the court specifically stated that it found that the aggravating circumstances outweighed the mitigating. Booker v. State, supra at 397 So.2d 916-918. The trial court specifically found that there was "no evidence whatever of extreme mental or emotional disturbance during the commission of the murder." Id. at 397 So.2d 916. These findings were not disturbed by the Supreme Court of Florida on direct review.

Petitioner's present attorney is the same attorney who represented Petitioner at trial, on direct appeal, and on his collateral attacks in state and federal court. No allegation has been made that Petitioner has been denied effective representation of counsel at any stage of the proceedings, and, in fact, the federal district judge specifically noted in his order denying habeas relief that Petitioner's lawyer "has done a thorough, workmanlike job for Booker. Mr. Bernstein, like lawyers I have seen in other death penalty cases, impresses me and is a credit to the legal profession." A copy of this order has also been included in the Appendix to this brief.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE PROVISIONS OF ESTELLE V. SMITH ARE NOT VIOLATED WHEN A CAPITAL DEFENDANT VOLUNTARILY TAKES THE STAND DURING THE SENTENCING PHASE OF THE TRIAL AND IS CROSS-EXAMINED BY THE STATE ABOUT MATTERS WHICH WERE BROUGHT OUT BY THE DEFENSE DURING DIRECT EXAMINATION.

This is at least the fifth time Petitioner has raised this claim--he raised it unsuccessfully on direct appeal to the Florida Supreme Court, unsuccessfully on certiorari to this Court, unsuccessfully in the federal district court, and unsuccessfully in the Eleventh Circuit. Respondent submits that once again this Court should decline to review the issue because the facts of Petitioner's case do not even remotely support an Estelle v. Smith, 451 U.S. 454 (1981) violation.

In Estelle v. Smith, the Court ruled that a defendant's fifth amendment right against self-incrimination had been violated by the state's deliberate and intentional use of psychiatric information which had been initially obtained only to assist in determining the defendant's sanity and competency to stand trial. However, in Petitioner's case, the Supreme Court of Florida found that "the record does not conclusively show that the state attorney secured this information from the psychiatric reports." Booker v. State, supra at 397 So.2d 914. Moreover, this Court clearly stated in Estelle v. Smith that the situation there was not "analagous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense." Id. at 451 U.S. 465. The Court noted that when a defendant asserted a defense of insanity and introduces psychiatric testimony to support that defense, "his silence may deprive the state of the only effective means it has of controverting its proof on an issue that he interjected into the case." Id. The Court stated that petitioner Estelle had not

introduced any psychiatric evidence, but instead, the state had offered information obtained from the competency examination "as affirmative evidence to persuade the jury to return a sentence of death." Id. at 451 U.S. 466. That is not the situation in Petitioner's case.

The Supreme Court of Florida found on direct appeal that Petitioner had "opened the door" concerning what he remembered:

> During the cross-examination there was no reference made by the prosecutor to the psychiatrist or to the psychiatric reports. The defendant opened up the question of what he remembered and whether he did or did not remember certain things. The trial court was correct in ruling that the state attorney had a right to inquire as to what defendant remembered, as this was an issue presented by the defendant during the sentence proceedings.

Booker v. State, supra at 397 So.2d 914.

The Eleventh Circuit agreed with the Supreme Court of Florida and held that "there is no constitutional prohibition against using the information for impeachment purposes." Booker v. Wainwright, supra at 703 F.2d 1258. The court quoted from Harris v. New York, 401 U.S. 222 (1971), for the proposition that defendants who voluntarily take the stand cannot use Miranda as a license to commit perjury. Id. The Eleventh Circuit also noted that the cross-examination may have been outside the scope of direct examination, but that court quoted from the Florida Supreme Court which had ruled that Petitioner had opened up the matter during direct examination. In any event, Petitioner did not object at trial on the grounds that the cross-examination was outside the scope of direct examination, and the law in Florida is clear that the prosecution is allowed wide latitude during cross-examination. Sireci v. State, 399 So.2d 964, 969 (Fla. 1981), cert. denied, 456 U.S. 984 (1982).

Respondent disagrees with Petitioner's assertion that the Eleventh Circuit "accepted the factual premises of Booker's claim." (Petition at 7) The Eleventh Circuit specifically noted that it assumed without deciding that the prosecutor obtained the information brought out on cross-examination from the psychiatric reports. Booker v. Wainwright, supra at 703 F.2d 1258. What the Eleventh Circuit did rule was that, in effect, constitutionally it made no difference because the information was properly brought out as impeachment under Harris v. New York, supra.

Respondent also disagrees with Petitioner's attempt to insert the issue of the reliability of Petitioner's admission on cross-examination that he had been convicted of numerous Article 15's while he was in the Army. These questions were not objected to at trial, and Petitioner's lawyer did not raise them on direct appeal or even in the federal district court. They were raised for the first time on rehearing in the Eleventh Circuit. As the court noted in Barefoot v. Estelle, ___ U.S. ___, 77 L.Ed.2d 1090, 1100 (1983), "[f]ederal courts are not forums in which to relitigate state trials." This should be especially true when the matter was never litigated at all in the state courts.

Moreover, as Justice Rehnquist noted in his concurring opinion in Estelle v. Smith, supra at 451 U.S. 475, the Miranda requirements were not designed "with psychiatric examinations in mind." Rather, Miranda applies only to compelled self-incrimination, and it should not be extended to a situation like Petitioner's case where a defendant initiates the request for a psychiatric examination. To the extent that Petitioner is now attempting to make his case look like New Jersey v. Portash, 440 U.S. 450 (1979), Petitioner should not be persuasive because that case involved involuntary statements induced by promises of immunity. In Petitioner's case, however, Petitioner never claimed in the state courts that his statements to the

psychiatrists were involuntary, and he did not mention the issue on direct appeal nor did he raise it in his Petition for Writ of Habeas Corpus filed in the federal district court. The reason for these omissions is probably that defense counsel realized he was bound by the grounds of his objection at trial, i.e., that the psychiatric reports were "privileged" because they had been sealed prior to trial, but the fact remains Petitioner should not now be allowed to raise the issue in these terms because the records in the state and federal courts do not support this claim. See Engle v. Isaac, 456 U.S. 107 (1982).

In summary, Petitioner's case is not like the situation disapproved in Estelle v. Smith, supra, because it was Petitioner who initiated the psychiatric examination. Unlike the situation in Estelle v. Smith, the state would not have been permitted under Florida law to use the information from the psychiatric reports to support its request for the death penalty. However, Petitioner waived his right to prevent the state from using the psychiatric reports when he voluntarily took the stand and "opened the door" during direct examination when he claimed he could not remember certain events. Thus, the Eleventh Circuit correctly found that Petitioner's case was like Harris v. New York, supra, which allowed the use of inadmissible evidence during impeachment. See also United States v. Havens, 446 U.S. 620 (1980).

II.

THE FLORIDA SUPREME COURT'S FINDING THAT THE PROSECUTION WAS PERMITTED TO BRING OUT TESTIMONY OF PETITIONER'S BAD ACTS DURING CROSS-EXAMINATION IN THE SENTENCING PROCEEDINGS IS A MATTER OF STATE LAW AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Throughout the proceedings in both the state courts and federal courts, Petitioner has presented this claim in terms of whether the sentence of death must be vacated because both the jury and the trial court considered an improper aggravating circumstance. In his brief in the Eleventh Circuit, Petitioner relied principally on Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982), however, this case was vacated in light of the court's recent opinion of Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d 1134 (1983). See Wainwright v. Henry, ___ U.S. ___, 77 L.Ed.2d 1407 (1983).

In Barclay, the court noted that nothing in the United States Constitution prohibited a sentencing authority from considering a capital defendant's criminal record when determining what sentence to impose. Id. at 77 L.Ed.2d 1148. The court also noted that while it was true under Florida law that the State was not permitted to introduce a defendant's previous criminal history as a separate aggravating circumstance, Florida law does permit this type of evidence to rebut the absence of a mitigating circumstance of lack of significant criminal history. Id.

Moreover, the Supreme Court of Florida expressly found that:

> Unless this mitigating factor is negated, there would be a presumption that defendant had not engaged in any previous activity. It is apparent from an examination of the findings of the court that this evidence was not considered as an aggravating factor. The principles announced in Elledge, supra, and Mikenas v. State, 367 So.2d 606 (Fla. 1978), are not applicable.

Booker v. State, supra at 397 So.2d 918. In Barclay, the Court noted that this type of evidence was not prohibited by the Constitution, and to the extent that it violated state law, "mere errors of state law are not the concern of this Court, Gryger v. Burke, 334 U.S. 728 (1948), unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." Id. at 77 L.Ed.2d 1149.

It should also be noted that the information about the number of Article 15's came from Petitioner's own mouth on cross-examination. The prosecutor was unaware of the correct number, and he had no way to impeach Petitioner's answer even had he known Petitioner was not telling the truth. How can Petitioner be allowed to complain when it was he who provided the alleged erroneous information? Moreover, it should be pointed out that Petitioner's military records were not introduced into evidence by either party and that the information in the pre-sentence investigation is based upon a telephone conversation. Finally, the Court should note that Petitioner did not object to this information and did not challenge its validity until late in the federal habeas proceedings.

Certiorari should be denied on this issue because it presents only a question of state law. Barclay, supra.

III.

THE ISSUE OF THE TRIAL COURT'S JURY INSTRUCTIONS DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL IS BARRED FROM FEDERAL HABEAS REVIEW BECAUSE OF PETITIONER'S PROCEDURAL DEFAULT IN THE STATE COURTS OF FLORIDA PURSUANT TO THE SYKES-ENGLE DOCTRINE.

During the federal habeas proceedings, Petitioner conceded that he had not objected to the jury instructions and had not raised this issue on direct appeal. Booker v. Wainwright, supra at 703 F.2d 1259. The Eleventh Circuit found that Petitioner's complaints about the jury instructions were barred from consideration on federal habeas review because of Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, supra.

The Eleventh Circuit rejected Petitioner's attempt to show cause and prejudice for his procedural default. Petitioner argued that at the time the jury instructions were given, Florida law did not allow submission of non-statutory mitigating circumstances. However, this argument must fail for several reasons. First, Proffitt v. Florida, 428 U.S. 242, 250 (1976), which was decided prior to Petitioner's trial, specifically noted that Florida's death penalty statute did not limit consideration of non-statutory mitigating factors. Second, contrary to Petitioner's assertions, the case law in Florida was clear that evidence of non-statutory mitigating factors was allowed. See Halliwell v. State, 323 So.2d 557 (Fla. 1975); Messer v. State, 330 So.2d 137 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla. 1976); Chambers v. State, 339 So.2d 204 (Fla. 1976); McCaskill v. State, 344 So.2d 1276 (Fla. 1976); Buckrem v. State, 355 So.2d 111 (Fla. 1978). Petitioner's trial began after all these opinions had been rendered by the Supreme Court of Florida.

Finally, even assuming that Petitioner is correct that such an objection would have been futile in light of Florida law at the time of his trial, Justice O'Connor specifically noted in

Engle v. Isaac, supra, that the futility of presenting an objection to the state courts cannot constitute cause for a failure to object at trial.

In addition to his failure to demonstrate cause, Petitioner has also failed to demonstrate actual prejudice. In that regard, Petitioner's case is similar to Hopper v. Evans, 456 U.S. 605 (1982), which stands for the proposition that prejudice cannot be presumed. In Petitioner's case, Petitioner asked the jury to recommend a sentence of death. Booker v. Wainwright, supra at 703 F.2d 1254.

Despite Petitioner's total failure to demonstrate cause and prejudice, his claim must also fail because the record demonstrates that Petitioner was in fact allowed to argue non-mitigating circumstances to the jury and the trial court. See the federal district judge's Order Denying Petition for Writ of Habeas Corpus at 3.

Petitioner's total failure to show cause and prejudice which would excuse his procedural default of failing to object to the jury instructions in the state trial court or raise the issue on direct appeal militate against the court's granting certiorari on this issue. In the alternative, certiorari should be denied on this issue because the record refutes Petitioner's allegations that he was denied the opportunity to prevent non-statutory mitigating factors during the sentencing proceedings.

IV.

THE ISSUE OF THE FLORIDA SUPREME COURT'S ALLEGED IMPROPER APPELLATE REVIEW OF DEATH CASES IS INAPPROPRIATE FOR CERTIORARI REVIEW BECAUSE IT PRESENTS A QUESTION OF STATE LAW RATHER THAN A SUBSTANTIAL FEDERAL QUESTION.

This identical issue has already been rejected for review by the Court in Brown v. Wainwright, supra. The Eleventh Circuit rejected the issue in an en banc opinion upon which certiorari is pending at this time. See Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983)(en banc), cert. pending.

Respondent submits that this issue presents merely a question of state law and that no substantial federal question is presented. However, even assuming that the Court accepts review in Ford v. Strickland, supra, review should be denied in Petitioner's case because the record clearly reflects what was considered at all stages of the review process. In particular, the federal district judge noted that Petitioner had not alleged that any improper information had been considered in his case and that absent any factual allegation of wrongdoing, improper conduct could not be presumed. See Order Denying Petition for Writ of Habeas Corpus at 6. Moreover, the Eleventh Circuit noted that Petitioner's attorney was furnished with the Florida Supreme Court's request of the pre-sentence investigation report. Booker v. Wainwright, supra at 703 F.2d 1260.

The federal district judge also noted that Petitioner's case was decided after the Supreme Court of Florida decided Brown v. Wainwright, supra. In other words, even assuming that the Florida Supreme Court's practice was improper, it could not be presumed that the court would continue an improper practice after Brown v. Wainwright was decided. See Harris v. Rivera, 454 U.S. 339 (1981), in which the Court recognized that trial court's routinely heard inadmissible evidence which they were presumed to

ignore when making decisions. The Court also reiterated that a silent record is not a sufficient basis for concluding that a state judge has committed error, and the Court concluded that a mere possibility of error is not enough to warrant habeas corpus relief. Unfortunately for Petitioner, as was pointed out in the federal district court as well as the Eleventh Circuit, he cannot even argue his record is silent because his record affirmatively shows that his trial counsel either submitted or was aware of all the matters considered by the jury, the trial court, and the Supreme Court of Florida. See Booker v. Wainwright, supra at 703 F.2d 1260. Certiorari should be denied on this issue.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to STEPHEN N. BERNSTEIN, ESQUIRE, 609 N.E. First Street, Post Office Box 1642, Gainesville, Florida 32602, this 12th day of September, 1983.

Lawrence A. Kaden
LAWRENCE A. KADEN

No. 83-5209

IN THE SUPREME COURT OF
THE UNITED STATES

October Term 1982

STEPHEN TODD BOOKER,

Petitioner,

-vs-

LOUIE L. WAINWRIGHT, Secretary
of the Florida Department of
Corrections,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

APPENDIX

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Florida Supreme Court's Opinion in Booker v. State, 397 So.2d 910 (Fla. 1981)

Eleventh Circuit's Opinion in Booker v. Wainwright, 703 F.2d 1251 (11th Cir. 1983)

Order Denying Petition for Writ of Habeas Corpus, entered by Hon. Lynn Higby, N.D. Fla., April 19, 1982

Petition for Writ of Certiorari previously filed in United States Supreme Court in Case No. 81-5086

Brief for Respondent State of Florida in Opposition to Petition for Writ of Certiorari in Case No. 81-5086

Appellant's Initial Brief filed on direct appeal in the Supreme Court of Florida

Appellant's Initial Brief filed in the Eleventh Circuit in Case No. 82-5468

Appellant's Reply Brief filed in the Eleventh Circuit in Case No. 82-5468

Respondent/Appellee's Brief filed in the Eleventh Circuit in Case No. 82-5468

Eleventh Circuit's Order staying mandate in Case No. 82-5468

especially heinous, atrocious, and cruel. *Id.* § 921.141(5)(h). The court found that there were no mitigating circumstances.

[11] The trial judge's finding that appellant was under sentence of imprisonment was based on the fact that he was on parole from prison. We hold that this fact, established by evidence, supports the finding of this aggravating circumstance.

[12] The trial judge's findings that the murder was committed in the course of a robbery and that it was committed for pecuniary gain are both based on the same aspect of the crime. Where such double recitation of aggravating circumstances based on a single aspect of the crime indicates that inflated consideration was accorded to the factor, it is error. *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Where it is clear that the sentencing judge merely recited both statutory factors without giving improper double consideration to the single aspect in question, or where the absence of mitigating circumstances makes clear that any added weight accorded the factor did not tip the balance in favor of a sentence of death rather than life, the error of double recitation is harmless. *See Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); *Elledge v. State*, 346 So.2d 998 (Fla.1977). We approve the finding of one statutory aggravating circumstance based on the commission of murder in the course of the felony of robbery.

The trial judge's finding that the capital felony was especially heinous, atrocious, and cruel was based on evidence that appellant directly participated in the murder inflicted by multiple stab wounds and bludgeoning. The evidence supports the factual findings and the facts establish this statutory factor. *See, e. g., Washington v. State*, 362 So.2d 658 (Fla.1978), *cert. denied*, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979); *Funchess v. State*, 341 So.2d 762 (Fla.1975), *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158 (1977).

Upon our review of the sentencing proceedings and the court's findings based on the whole record, we conclude that there was no prejudicial error in the sentencing phase and that the court properly found several aggravating circumstances and no mitigating circumstances. The sentence of death is proper.

The judgment of conviction of murder in the first degree is affirmed. The sentence of death, having been found to be appropriate to this case, is approved.

It is so ordered.

ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.

SUNDBERG, C. J., concurs in result only.

Stephen Todd BOOKER, Appellant,

v.

STATE of Florida, Appellee.

No. 55568.

Supreme Court of Florida.

March 19, 1981.

Rehearing Denied June 2, 1981.

Defendant was convicted in the Circuit Court, Alachua County, John J. Crews, J., of murder in the first degree, sexual battery and burglary, and sentenced to death, and he appealed. The Supreme Court, Adkins, J., held that: (1) in sentencing procedure, trial court was correct in ruling that state attorney had right to inquire as to what defendant remembered; (2) photograph revealing knife protruding from victim's throat was admissible; (3) trial judge did not abuse his discretion in admitting card containing set of latent fingerprints lifted from closet door located inside bedroom of victim's apartment; (4) overwhelm-

ing circumstantial evidence demonstrated that defendant used force likely to cause serious bodily injury in commission of sexual battery; (5) State proved intent to commit a crime as required to support conviction of burglary with intent to commit larceny; (6) in sentencing proceeding, trial court did not take into account in "weighing process" any conceivable nonstatutory aggravating circumstances; (7) sentence of death was proper; (8) statute governing procedure when person is convicted of capital felony did not violate Constitution on ground that it attempted to govern practice and procedure; (9) death penalty statute was not too narrowly defined in range of mitigating circumstances which sentencing authority could consider; and (10) death by electrocution is not cruel and unusual punishment.

Affirmed.

1. Witnesses ⇐305(2)

Defendant who takes stand as witness in his own behalf occupies same status as any other witness, and all rules applicable to other witnesses are likewise applicable to him.

2. Witnesses ⇐305(2)

Defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to testimony he gives, and that waiver is no less effective or complete because defendant may have been motivated to take witness stand in first place only by reason of strength of lawful evidence adduced against him.

3. Criminal Law ⇐393(1)

In sentencing proceeding which resulted in death sentence, where defendant opened up question of what he remembered and whether he did or did not remember certain things, trial court was correct in ruling that state attorney had right to inquire as to what defendant remembered, and record did not conclusively show that state attorney secured this information from psychiatric reports, which defendant contended violated his right against self-incrimination. West's F.S.A. § 921.141.

4. Criminal Law ⇐438(1)

Photographs are admissible if they properly depict factual conditions relating to crime and if they are relevant in that they aid court and jury in finding truth.

5. Criminal Law ⇐438(6)

In prosecution which resulted in conviction for murder in the first degree, sexual battery and burglary, photograph revealing knife protruding from victim's throat was admissible in connection with testimony regarding causes of death, to show nature and extent of "force and violence" used to perpetrate crime, and premeditated and cold-blooded intent of defendant. West's F.S.A. § 810.02.

6. Criminal Law ⇐338(1), 1153(1)

Trial judge enjoys wide discretion in areas concerning admission of evidence, and his ruling on admissibility of evidence will not be disturbed unless abuse of discretion is shown.

7. Criminal Law ⇐339.6

In prosecution which resulted in conviction for murder in the first degree, sexual battery and burglary, trial judge did not abuse his discretion in admitting card containing set of latent fingerprints lifted from closet door located inside bedroom of victim's apartment. West's F.S.A. § 810.02.

8. Rape ⇐51(4)

Overwhelming circumstantial evidence demonstrated that defendant used force likely to cause serious bodily injury in commission of sexual battery.

9. Burglary ⇐41(3)

Conviction of burglary requires proof of intent to commit crime that was alleged. West's F.S.A. § 810.02.

10. Burglary ⇐41(3)

Evidence that bureau drawers, metal boxes and jewelry boxes were rummaged and apartment ransacked supported inference that defendant was in search of valuables and that his object was to steal them as required to support conviction of burglary with intent to commit larceny. West's F.S.A. §§ 810.02, 810.07.

11. Homicide ⇐354

Trial court, in sentencing defendant convicted of murder in the first degree to death, did not take into account in "weighing process" any conceivable nonstatutory aggravating circumstances, since alleged previous acts of violence brought out by cross-examination of defendant during sentencing proceedings were not considered. West's F.S.A. § 921.141.

12. Homicide ⇐354

Having found no mitigating circumstances and several aggravating circumstances, including factor that murder of which defendant was convicted was especially heinous, atrocious and cruel, trial judge properly imposed sentence of death. West's F.S.A. § 921.141.

13. Constitutional Law ⇐55
Criminal Law ⇐1206(1)

Statute governing procedure when person is convicted of capital felony does not violate Constitution because it attempts to govern practice and procedure. West's F.S.A. § 921.141; West's F.S.A.Const. Art. 5, § 2(a).

14. Criminal Law ⇐1206(1)

Death penalty statute was not too narrowly defined in range of mitigating circumstances which sentencing authority could consider, and directions given judge and jury by statute were sufficiently clear and precise to enable various aggravating circumstances to be weighed against mitigating ones. West's F.S.A. § 921.141.

15. Criminal Law ⇐1213

Death by electrocution is not cruel and unusual punishment. U.S.C.A.Const. Amend. 8.

Stephen N. Bernstein, Asst. Public Defender, Gainesville, for appellant.

Jim Smith, Atty. Gen., and Charles A. Stampelos, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is an appeal from a judgment adjudicating defendant guilty of murder in the first degree and an order imposing a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. (1972).

Defendant was also adjudged guilty of sexual battery and burglary, receiving a sentence of fifty-five years for sexual battery and thirty-five years for burglary.

The victim, an elderly woman, was found dead in her apartment in Gainesville, Florida. The cause of death was loss of blood due to several knife wounds in the chest area. Two knives, apparently used in the homicide, were embedded in the body of the victim. A pathologist located semen and blood in the vaginal area of the victim and concluded that sexual intercourse had occurred prior to death. The apartment was found to be in a state of disarray; drawers were pulled out and their contents strewn about the apartment. Fingerprints of the defendant were positively identified as being consistent with latent fingerprints lifted from the scene of the homicide. The defendant had a pair of boots which had a print pattern similar to those seen by an officer at the scene of the homicide.

Test results indicated that body hairs found on the clothing of the defendant at the time of his arrest were consistent with hairs taken from the body of the victim.

After being given the appropriate warnings, the defendant made a statement, speaking as an alternative personality named "Aniel." The "Aniel" character made a statement that "Steve had done it."

The indictment returned by the grand jury charged defendant with murder in the first degree, sexual battery, and burglary. A motion for mental examination and notice of defense of insanity were filed on behalf of the defendant and he was examined by three psychiatrists.

The defendant entered a plea of not guilty, but did not testify during the guilt phase of the trial. He was found guilty on all three counts of the indictment.

During the sentencing phase of the proceedings the defendant testified. At the conclusion of his testimony, and against the advice of his attorney, the defendant made a statement to the jury saying, "A defendant found guilty of such a crime should receive the death penalty." The jury recommended the death penalty and defendant was sentenced to death. This appeal resulted.

The defendant contends that during the sentencing proceedings the court committed error in permitting the prosecutor to ask questions based on information gathered from court ordered psychiatric reports. The defendant argues that this violated his right against self-incrimination. During the sentence hearing the defendant testified on direct examination that he had "no recollection" as to what happened on the day of the homicide. He stated that he had been hospitalized eight times in the past. During the times that he was hospitalized from the age of thirteen until now, the defendant said he could not remember the reasons for being in the hospital. He testified that on three of the occasions his lack of memory was "the reason for being in the hospital." On cross-examination the defendant testified that he did not consider himself a violent person, but that he did have problems with acts of violence while in the service. He denied that he attempted to kill people, but admitted that while in Okinawa he robbed houses of prostitution and used a claw hammer with which to hit people. He admitted that he hit about five people. The prosecutor then asked defendant if he remembered "getting up feeling like he wanted to kill someone that day." His counsel objected at that point, contending that the prosecutor was seeking to elicit information contained in the reports of the psychiatrist and such information was privileged. The court ruled that the question went toward the defendant's lapse of memory on the day of the incident and was proper cross-examination. Finally, when asked if he thought about killing anyone that day, the defendant responded, "Sometime I did, but I gave up the idea because it was crazy."

The defendant recognizes that a court ordered psychiatric examination generally is not considered violative of defendant's right to freedom from compelled self-incrimination and that psychiatrists may render opinions concerning sanity based on factual statements made by the defendant. However, the defendant points out that direct testimony concerning the facts surrounding a crime is prohibited where ascertained from a compulsive mental examination. Defendant relies upon *Parkin v. State*, 238 So.2d 817 (Fla.1970), in which we held that the trial court should prohibit a psychiatrist from testifying directly as to the facts surrounding the crime, where such facts have been elicited from the defendant during the course of a compulsory mental examination. We said that the state, in its inquiry of a court appointed psychiatrist, should not go beyond eliciting the opinion of the expert as to sanity or insanity and should not inquire as to information concerning the alleged offense provided by a defendant during his interview.

The defendant also cites *McMunn v. State*, 264 So.2d 868, 869 n.2 (Fla. 1st DCA 1972), where the court labeled as objectionable the question to the defendant, "[w]hether or not at that time and place you told Dr. Nelson the details of what happened that night including firing the shot?" The court also said that later impeachment testimony through the person of Dr. Nelson, the examining psychiatrist, was inadmissible. The defendant contends that the cross-examination of him by the prosecutor during the sentencing proceedings was based primarily upon information obtained from the report of the psychiatrist. This being privileged information, he argues that it was not subject to disclosure by cross-examination of defendant after he had taken the witness stand.

[1, 2] In *Parkin, supra*, we pointed out that if a defendant's counsel opens the inquiry to collateral issues, or admissions, or guilt, the state's redirect examination properly could inquire within the scope opened by the defense. The defendant took the

stand during the sentence proceedings, and presented the issue of whether he could remember certain events. When the defendant chose to testify in his own behalf during the sentence proceedings, the issue of guilt had been decided adversely to him. A defendant who takes the stand as a witness in his own behalf occupies the same status as any other witness, and all the rules applicable to other witnesses are likewise applicable to him. *Hoskins v. State*, 70 Fla. 186, 69 So. 701 (1915); *Faulkner v. State*, 151 So.2d 17 (Fla. 2d DCA), *cert. denied*, 156 So.2d 389 (Fla.1963). By taking the witness stand the defendant automatically subjected himself to cross-examination. *Kilgore v. State*, 271 So.2d 148 (Fla. 2d DCA 1972). A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him. *Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968).

[3] During the cross-examination there was no reference made by the prosecutor to the psychiatrist or to the psychiatric reports. The defendant opened up the question of what he remembered and whether he did or did not remember certain things. The trial court was correct in ruling that the state attorney had a right to inquire as to what defendant remembered, as this was an issue presented by the defendant during the sentence proceedings. Furthermore, the record does not conclusively show that the state attorney secured this information from the psychiatric reports.

During the course of the trial the state introduced into evidence two photographs of the victim as she was found at the scene of the crime. The defendant had no objection to the first photograph showing the position of the victim and the manner in which she was found. The second photograph was similar to the first but a cloth had been removed from the victim so as to reveal a knife protruding through the victim's throat. The defendant says that this photograph was so prejudicial as to render it inadmissible.

[4, 5] Photographs are admissible if they properly depict the factual conditions relating to the crime and if they are relevant in that they aid the court and jury in finding the truth. *Swan v. State*, 322 So.2d 485 (Fla.1975). The photograph was used in connection with testimony regarding the causes of death, *Henninger v. State*, 251 So.2d 862 (Fla.1971); the nature and extent of the "force and violence" used to perpetrate the crimes, *Alford v. State*, 307 So.2d 433 (Fla.1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976); and the premeditated and coldblooded intent of the defendant, *Foster v. State*, 369 So.2d 928 (Fla.), *cert. denied*, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979). The photograph was used for any or all of these three purposes, so making it relevant and admissible.

[6, 7] Investigator Terry lifted, among others, one particular set of latent fingerprints from a closet door located inside a bedroom of the victim's apartment. The latent fingerprints were placed on a card. The card was given by Terry to George Johnson, the latent examiner. Investigator Terry stated that the card was not in the same condition when it was introduced into evidence as when he lifted it. The fingerprint card was marked for identification. Investigator Terry did not make a similar comment regarding any other latent fingerprint card. George Johnson, the latent examiner, testified that he received the card from Investigator Terry; that he had the card in his custody until it was brought to court; and that it did not appear to be tampered with in any way. The trial judge enjoys wide discretion in areas concerning the admission of evidence. His ruling on the admissibility of evidence will not be disturbed unless an abuse of discretion is shown. *Rodriguez v. State*, 327 So.2d 903 (Fla. 3d DCA), *cert. denied*, 336 So.2d 1184 (Fla.1976); *Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968), *appeal dismissed*, 234

So.2d 120 (Fla.1969), *cert. denied* 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970). The defendant has failed to show an abuse of discretion by the trial judge in admitting the card into evidence.

[8] The defendant contends that a reasonable hypothesis of innocence exists on the question of whether or not actual physical force likely to cause bodily injury was used in the commission of the sexual battery. There was overwhelming circumstantial evidence demonstrating only one reasonable hypothesis, to wit: that defendant used force likely to cause serious bodily injury in the commission of the sexual battery. *See Hoy v. State*, 353 So.2d 826 (Fla. 1977), *cert. denied*, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978); *Jones v. State*, 332 So.2d 615 (Fla.1976); *Hallman v. State*, 305 So.2d 180 (Fla.1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

[9] The defendant seeks a reversal of his conviction of burglary with intent to commit larceny because the state failed to prove an intent to commit a crime. It is true that a conviction of burglary requires proof of an intent to commit the crime that was alleged. *Rumph v. State*, 248 So.2d 526 (Fla. 1st DCA 1971). There was no showing that any property was taken from the victim's home. In fact, cash in the amount of $370.00 was found in the home by police officers who arrived at the scene.

[10] "Burglary" means entering or remaining in a structure or conveyance with the intent to commit an offense therein. § 810.02, Fla.Stat. (1977). In a trial on the charge of burglary, proof of the entering of such structure at any time stealthily and without the consent of the owner is prima facie evidence of entering with intent to commit an offense. § 810.07, Fla.Stat. (1977). The evidence shows that bureau drawers, metal boxes, and jewelry boxes were rummaged. The apartment was ransacked. From this evidence the jury could infer that the defendant was in search of valuables and that his object was to steal them. *Walker v. State*, 44 Fla. 466, 32 So. 954 (1902). *See also Guerrero v. State*, 289 So.2d 396 (Fla.1974); *conformed to* 291 So.2d 103 (Fla. 3d DCA 1974). Intent, being a state of mind, must in most cases be inferred from the circumstances. *Edwards v. State*, 213 So.2d 274 (Fla. 3d DCA), *cert. denied*, 221 So.2d 746 (Fla.1968). The circumstances in the case *sub judice* are open to only one reasonable interpretation, *i.e.*, that the defendant entered the structure with intent to commit a larceny therein. The jury so concluded. The trial court did not instruct the jury on burglary with intent to commit *grand larceny*, so the charge was limited to the crime of breaking and entering the structure with the intent to commit petit larceny. The conviction of burglary is affirmed.

In attacking the death sentence the defendant says that the trial court improperly considered the alleged previous acts of violence brought out by the cross-examination of the defendant, for they were unauthorized aggravating factors. The state replies that the trial court considered only statutory aggravating circumstances. The findings of the trial judge read as follows:

MITIGATING CIRCUMSTANCES

(a) Whether the defendant has no significant history of prior criminal activity. *Finding*:

As a juvenile, Booker came to the attention of authorities for assaultive tendencies, truancy and theft. He was committed at least once to the Youth Center in New York and was given six months probation. He began using drugs of all kinds except "speed" when he was 13 years of age.

The Defendant had one confirmed Army 15 involving violence to another.

On November 12, 1974, the Defendant was sentenced in the Circuit Court, Collier County, Florida to five years in the state penal institutions for the offense of Robbery (strong arm) [.]

(b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Finding:

Booker knew and was able to understand the nature, quality, and wrongfulness of his acts on November 9, 1977; was able to understand the charges against him; and was able to adequately cooperate with and assist his counsel in his defense at trial.

Booker has been an antisocial, hostile, somewhat paranoid individual who learned at an early age that "he could easily obtain what he wanted by illegal means and that he could control others through fear and manipulation."

There was argument of counsel, but no evidence whatever of extreme mental or emotional disturbance during the commission of the murder. [Refer to mitigation finding (e).] (brackets in original).

(c) Whether the victim, LORINE DEMOSS HARMON, was a participant in the defendant's conduct or consented to the act(s)[.]

Finding:

The victim did not at any time nor in any way consent to or participate in the conduct of defendant and his acts.

(d) Whether the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

Finding:

Booker was not an accomplice. No one else was involved, directly or indirectly. He was the aggressive perpetrator of the burglary of the dwelling, the sexual battery, and the murder.

(e) Whether the Defendant acted under extreme duress or under the substantial domination of another person.

Finding:

The Defendant did not act under the domination—not to mention—substantial domination of another person. The "Aniel syndrome" whereby Booker claimed that "Aniel" did it is and was irrelevant, most likely self-serving, and the evidence is bereft of any believable fact that the Defendant was being dominated by "Aniel" or anyone. To the contrary, he was the manipulative master of his acts at the time of the crimes.

Though the Defendant consumed intoxicants before the murder and may have experienced the "Aniel' phenomenon afterward, there isn't any evidence that he was under extreme duress at the time of the crimes.

(f) Whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Finding:

At the time of the commission of the capital felony the Defendant's capacity to appreciate the criminality and to conform his conduct to requirements of law was not substantially impaired [Refer to mitigation finding (b).] (Brackets in original).

"(g) The age of the Defendant at the time of the crime."

Finding:

Booker was in his majority at the age of twenty-four years at the time of the crime(s). Therefore, age had no particular significance and is not a mitigating circumstance.

AGGRAVATION

(a) Whether the defendant was under sentence of imprisonment when the defendant committed the murder of which the defendant has been convicted.

Finding:

Booker was not under sentence of imprisonment when he committed the murder for which he has been convicted.

(b) Whether the defendant has previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person.

Finding:

The defendant had been previously convicted of a felony involving the use of threat of violence to another.

(c) Whether, in committing the murder of which the defendant has been convicted, the defendant knowingly created a great risk of death to many persons.

Finding:

The Court does not consider the above provision in the Statute applicable to the defendant as an aggravating circumstance.

(d) Whether the murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any burglary or rape.

Finding:

The stabbing which caused the death of LORINE DEMOSS HARMAN took place immediately after the vaginal penetration of her by the sex organ of STEPHEN TODD BOOKER. The other wounds took place while or immediately before and after completion of the crime of sexual battery. The capital murder also took place after Booker committed the felony of burglary of a dwelling as charged in Count III of the Indictment, and before he completed his flight from said crime.

(e) Whether the murder of which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

Finding:

The murder was not committed for the latter of these purposes, but, among other reasons, was committed for the purpose of avoiding or preventing a lawful arrest. [See aggravation paragraph below (h).] (Brackets in original).

(f) Whether the murder of which the defendant has been convicted was committed for pecuniary gain.

Finding:

There isn't evidence that the capital murder was committed for pecuniary gain though Booker did obtain personal property of his victim, and he thoroughly searched her apartment for whatever he wanted.

(g) Whether the murder of which the defendant has been convicted was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

Finding:

Not applicable as an aggravating circumstance.

(h) Whether the murder of which the defendant was convicted was especially heinous, atrocious or cruel.

Finding:

LORINE DEMOSS HARMAN was 94 years of age at the time of her death. She was active, alert, spry, enjoyed playing bridge on a regular basis with her friends, participated in church and other wholesome activities, preferred to take care of herself in her own apartment, to come and go in her pursuit of happiness and looked forward, as most others do, to the enjoyment of life.

Booker did not know Mrs. Harman. When she returned from visiting with friends, the defendant severely beat, wounded, raped and finally killed her, but his aggressive, antisocial hatred had not yet been satiated, hence, she was stabbed in the throat before death and after suffering the horrible indignities inflicted upon a lady who had not previously confronted such a gross animal-like fiend.

It is manifest from her picture in death that she suffered greatly in body and mind, knowing that her death was near and by reason of degrading inhuman cruelty.

There were seven stab wounds in her chest with one knife left embedded to its handle. There were no fewer than two stabs in her throat with a butcher knife left sticking through that part of her anatomy. There were other wounds and contusions with internal bleeding consistent with the outrageous beating of a 90-pound female by a strong overpowering male[.] Beyond gainsay, this cold, calculated capital murder was especially heinous, atrocious and cruel.

ACCORDINGLY, the Court further finds that there are insufficient mitigating circumstances to outweigh the aggravating circumstances which are sufficient to require the pronouncement of sentence hereinafter made.

The Court further finds that considering the facts and circumstances of this case a sentence less than that hereinafter pronounced would be insufficient, as Defendant himself stated.

[11] There were no mitigating circumstances to be weighed against the aggravating circumstances. The defendant's reliance on *Elledge v. State*, 346 So.2d 998 (Fla.1977), is misplaced because the record reveals that the trial court did not take into account in the "weighing process" any conceivable non-statutory aggravating circumstances. The questions posed to the defendant during cross-examination were used to negate a mitigating circumstance, *i.e.*, that defendant had a significant history of prior criminal activity. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Knight v. State*, 338 So.2d 201 (Fla. 1976); *Meeks v. State*, 336 So.2d 1142 (Fla. 1976). When the defendant elects to testify during the sentencing proceedings, it is appropriate for the prosecutor to cross-examine him concerning previous criminal activity. Unless this mitigating factor is negated, there would be a presumption that defendant had not engaged in any previous criminal activity. It is apparent from an examination of the findings of the court that this evidence was not considered as an aggravating factor. The principles announced in *Elledge*, *supra*, and *Mikenas v. State*, 367 So.2d 606 (Fla.1978), are not applicable.

[12] The jury recommended a sentence of death. The trial judge recited that he found no mitigating circumstances. The trial court found several aggravating circumstances, including the factor that the murder of which defendant was convicted was especially heinous, atrocious, and cruel. The sentence of death was proper.

[13] Contrary to defendant's contention, we have held that section 921.141, Florida Statutes (1977), does not violate the requirements of article V, section 2(a), Florida Constitution, because it attempts to govern practice and procedure. *Dobbert v. State*, 375 So.2d 1069 (Fla.1979), *cert. denied*, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980).

[14] In light of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 923 (1978), the defendant says that Florida's death penalty statute is too narrowly defined in the range of mitigating circumstances which the sentencing authority may consider. This argument was rejected by this Court in *Songer v. State*, 365 So.2d 696 (Fla.1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). Also, the directions given to the judge and the jury by the Florida statute were sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). *See also State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

[15] Finally, we reject defendant's contention that death by electrocution is cruel and unusual punishment. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947); *Spinkellink v. Wainwright*, *supra*.

The judgments and sentences of the lower court are affirmed.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.

KEYNUMBER SYSTEM

that Fed.R.Evid. 104(a) requires the trial judge alone to determine the admissibility of the conspirator's statement. *Id.* at 579–80.

[27] We hold that the trial judge did not err in determining the admissibility of the co-conspirators' statements based on a reading of the tape transcripts. In *United States v. Miller*, 664 F.2d 826, 827–28 (11th Cir.1981), the court emphasized that the *James* holding did not require the trial judge to follow a specific procedure in determining the admissibility of the statements. The transcripts provide substantial evidence that Van Aernam was a member of the conspiracy and that the declarations were made in furtherance of the conspiracy. *See United States v. Kopituk*, 690 F.2d 1289, 1324 (11th Cir.1982) (standard of proof governing the admissibility of the declarations in a *James* context is one of substantiality).

Similarly, Murphy argues that his statements and those of his co-conspirators were inadmissible because there was no independent evidence of the conspiracy. The record reveals adequate evidence of conspiracy without consulting what would otherwise have been hearsay.

[28, 29] Murphy attempts to construct another argument about the overheard and often taped conversations of the conspirators. His premise is that the statements then made amount to admissions or confessions and should not have been admitted without corroboration. *See generally, Wong Sun v. United States*, 371 U.S. 471, 488–89, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963). The short answer is that his premise is incorrect. Those statements were not admissions of *having committed* a crime; the conspiratorial conversations were the commission of the crime, itself. Eye-witness, overheard, and taped proof of the commission of the crime of conspiracy is admissible.

Conclusion

Having concluded that none of the contentions raised by the appellants contain merit, we affirm the convictions on all counts charged.

AFFIRMED.

Stephen Todd BOOKER, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida, Respondent.

No. 82-5468.

United States Court of Appeals, Eleventh Circuit.

April 25, 1983.

Petitioner appealed from an order of the United States District Court for the Northern District of Florida, Lynn C. Higby, J., which denied his petition for habeas corpus relief. The Court of Appeals, Fay, Circuit Judge, held that: (1) where state court did not make explicit whether it was considering federal constitutional provision or its state constitutional counterpart, and cited cases construing both, federal habeas court would view the state court as having treated the issue as to whether petitioner's privilege against self-incrimination was violated by prosecutor's use of information derived from a psychiatric examination as arising under both federal and state law for *Sykes* purposes, and (2) in murder trial, prosecutor's use of information derived from a psychiatric examination of petitioner for purposes of impeaching his testimony during penalty phase did not violate his constitutional right against self-incrimination.

Affirmed.

1. Habeas Corpus ⇐45.3(1)

When state courts do not indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for state by entertaining the claim.

2. Habeas Corpus ⇐45.3(1)

Where state court did not make explicit whether it was considering federal constitutional provision or its state constitutional counterpart, and cited cases construing both, federal habeas court would view the state court as having treated the issue as to whether petitioner's privilege against self-incrimination was violated by prosecutor's use of information derived from a psychiatric examination as arising under both federal and state law for *Sykes* purposes. U.S.C.A. Const.Amend. 5; West's F.S.A. Const. Art. 1, § 9.

3. Witnesses ⇐301

Neither accused's mere submission to a psychiatric or psychological examination, nor fact that his counsel may have requested an examination foreclosed his claim that his constitutional privilege against self-incrimination was violated by prosecutor's use, in cross-examining accused, of information allegedly gained from his psychiatric examination. U.S.C.A. Const.Amend. 5.

4. Witnesses ⇐300

In murder trial, prosecutor's use of information derived from a psychiatric examination of accused for purposes of impeaching his testimony during penalty phase did not violate his constitutional right against self-incrimination. U.S.C.A. Const.Amend. 5.

5. Habeas Corpus ⇐85.1(2)

Federal habeas court would presume that jury in petitioner's murder trial followed trial court's instructions listing the aggravating circumstances and specifically limiting jury's consideration to those circumstances rather than invalidating imposition of death penalty on basis that introduction of evidence of petitioner's prior acts of violence might have been interpreted as a nonstatutory aggravating circumstance upon which jury relied.

6. Habeas Corpus ⇐85.5(8)

Petitioner failed to carry his burden of establishing that trial court's instructions to jury during advisory sentencing proceedings improperly limited jury's consideration of nonstatutory mitigating factors in deciding whether to recommend life or death.

7. Criminal Law ⇐1128(4)

Florida Supreme Court's solicitation of ex parte psychological material concerning petitioner in reviewing his murder conviction was not unconstitutional.

Stephen Bernstein, Gainesville, Fla., for petitioner.

Raymond Marky, Larry Kaden, Asst. Attys. Gen., Tallahassee, Fla., for respondent.

Appeal from the United States District Court for the Northern District of Florida.

Before FAY and VANCE, Circuit Judges, and ALLGOOD *, District Judge.

FAY, Circuit Judge:

Stephen Todd Booker appeals the district court's denial of his petition for habeas corpus challenging his sentence of death imposed pursuant to Florida Statute Section 921.141 (1977). On appeal, Booker advances four contentions: 1) the prosecutor's use of information derived from a psychiatric examination in cross examination of Booker during the penalty phase violated his fifth amendment rights; 2) the prosecutor's introduction of evidence concerning Booker's prior acts of violence permitted the jury to consider a nonstatutory aggravating circumstance; 3) the state trial court improperly limited the jury's consideration of nonstatutory mitigating factors; and 4) the Florida Supreme Court's solicitation of ex parte psychological material concerning

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

Booker was unconstitutional. After a careful consideration of Booker's claims on appeal, we affirm the denial of the petition for habeas corpus.

I. FACTUAL BACKGROUND

Booker was convicted on June 19, 1978 in the state court of first degree murder, sexual battery and burglary based upon evidence which showed that Booker entered the Gainesville, Florida apartment of Lorine DeMoss Harman, a ninety-four year old woman, raped Harman and stabbed her repeatedly in the chest and neck causing her death. Booker was connected to the crime by body hair samples, fingerprints, and testimony concerning the print pattern of his shoes. Further, Booker "confessed" to a Gainesville police detective. This "confession" occurred while Booker was describing himself in the third person as Steve and calling himself "Aniel," which he spelled out for the detective and described as a demon.[1] While Booker was "Aniel," the detective asked him if "Stephen had done it," and Booker replied, "He did it, God damn it, he did it." There is no contention that the confession was involuntary and in fact, its substance was adduced during cross examination of the detective by Booker's attorney.

After Booker was duly indicted by the grand jury and a public defender appointed to represent him, defense counsel filed a motion for mental examination and notice of defense of insanity. (State Record at 4). A county judge granted the motion, committing Booker to an intake facility of the Department of Health and Rehabilitative Services to determine whether he was competent to participate in his own defense and appointing Jose Lineas, M.D. and George Barnard, M.D. to examine Booker as to his sanity or insanity at the time of the offense. (State Record at 9). Thereafter, both the state and defendant filed separate motions to appoint an additional psychiatrist to examine Booker on the grounds that the previously appointed doctors were unable to reach a conclusion regarding Booker's sanity at the time of the offense. (State Record at 32, 36). The state court appointed Dr. Frank Carrera to examine Booker. (State Record at 45). Dr. Carrera testified during the defendant's case and Dr. Barnard testified during the state's rebuttal case.

The case was submitted to the jury after three days of trial proceedings. The jury deliberated for slightly in excess of three hours and returned verdicts of guilty on all three counts. The next day, the advisory sentencing proceedings occurred.[2] The only evidence introduced by the state at this time was a document relating to Booker's prior conviction for robbery. The only evidence[3] introduced by the defense was the testimony of Booker. Booker also made a statement prior to counsel's arguments on

1. The detective explained Booker during this time as follows:

> Prior to the time that he became Aniel he would chant. And the chanting would go on for perhaps ten seconds, 15 seconds, not long. It was during this time that the glassy eyes appeared. He had the glassy eye appearance. He would then settle, be serene, smile, and in my terminology clench his teeth. The grinding would stop, but his teeth would clench, and in that form he would begin to whisper things that I had to lean forward to hear.
>
> As my questioning related toward Aniel and who Aniel was, how he became acquainted with Aniel, and so on, as my questions grew more direct, he would burst into tears and cry. And he would laugh and wipe his tears from his eyes in a split second. He would then settle back in the chair, face me again, and be in a word, calm. He was rational in all aspects. Nothing was not understandable with the exception of the chant. (Transcript of Trial Proceedings, Vol. IV., p. 627).

2. Pursuant to Fla.Stat. Section 921.141 (1977), the court was required, upon the defendant's conviction of a capital felony, to conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. After hearing all the evidence, the jury deliberates and renders an advisory sentence to the court of either death or life imprisonment.

3. The jury, however, is not restricted to evidence presented during the penalty phase in arriving at its advisory sentence and may consider evidence presented throughout the trial.

sentencing.[4] After hearing counsel's arguments and receiving the trial judge's instructions, a majority[5] of the jurors recommended the death sentence.

In October 1978, the trial judge had before him a presentence investigation report, the psychological report of Dr. Elizabeth MacMahon, certain medical records, a letter from Booker and the sentencing memoranda of counsel, as well as the recommendation of the jury and the oral arguments of counsel. The trial judge considered the statutory aggravating and possible mitigating factors and sentenced Booker to death for the murder of Lorine DeMoss Harman,[6] entering his written order in accordance with Fla.Stat. Section 921.141(3) (1977). (State Record at 142). *See also, Booker v. State*, 397 So.2d 910, 915–918 (Fla.1981).

Booker appealed to the Florida Supreme Court which affirmed the conviction and sentence. *Booker v. State*, 397 So.2d 910 (Fla.), cert. *denied*, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981). Booker also joined 122 other death row inmates in petitioning the Florida Supreme Court for extraordinary relief based on that court's possible consideration of extra-record psychological material in affirming the sentences. The Florida Supreme Court denied relief, *Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981), and the United States Supreme Court denied certiorari, *Brown v. Wainwright*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

On March 22, 1982, the Governor of Florida signed a death warrant authorizing Booker's execution by electrocution on April 21. On April 13, Booker filed a petition for writ of habeas corpus in the district court for the Northern District of Florida, alleging various grounds for relief and including a prayer for stay of execution. The district court denied the stay orally on April 15 and by a summary order on April 19. (Record at 260). The district court filed its order denying petition for writ of habeas corpus on April 20. (Record at 261). Booker filed a notice of appeal and an application for certificate of probable cause and to proceed on appeal in forma pauperis (Record at 270–71). The district court issued a certificate of probable cause and a certificate to permit appeal in forma pauperis (Record at 260), as well as an order denying Booker's application for certificate of probable cause and to proceed on appeal in forma pauperis (Record at 273). In any event, appeal was taken to the Eleventh Circuit, which issued an order granting stay. *Booker v. Wainwright*, 675 F.2d 1150 (11th Cir.1982).[7] We now consider the merits of Booker's claims on appeal.

II. USE IN CROSS EXAMINATION OF PSYCHIATRIC EXAM INFORMATION

A. The Procedural Bar

On this appeal, Booker claims that his privilege against self incrimination was violated when the prosecutor utilized information during cross examination of Booker's

4. Booker, against the advice of his attorney, made the following statement to the jury:

> You people in the jury box have convicted me of first degree murder, sexual battery, and burglary. And you are going in the room and deliberate over what punishment should be given for a crime of this nature. A defendant found guilty of such a crime should receive the death penalty. That's it.

(Transcript of Trial Proceedings, Vol. V., p. 850).

5. Unlike the verdict, the advisory sentence of the jury need not be unanimous. Fla.Stat. Section 921.141(3) (1977). The jury considering Booker's sentence voted nine to three to impose the death sentence. (Transcript of Trial Proceedings, Vol. V., p. 886).

6. The trial judge also sentenced Booker to a fifty-five year term for sexual battery and to a thirty year term for burglary, both sentences to run consecutively.

7. The Eleventh Circuit panel noted:

> In the limited time available to this court to examine the procedure, it is unclear whether or not the district judge granted or denied petitioner's application for certificate of probable cause to appeal, there being in the papers furnished to us what appears to be an order granting same and another order of denial, both dated April 19, 1982. Petitioner alleges that the certificate of probable cause was denied.

675 F.2d at 1151.

penalty phase testimony which was derived from a psychiatric examination. Booker contends that since the constitutional protections mandated by *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), were not afforded Booker, his death sentence must be vacated.

The state, however, argues that we are barred from considering the merits of Booker's *Estelle v. Smith* claim in a habeas proceeding pursuant to 28 U.S.C. Section 2254 by the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In *Sykes*, the United States Supreme Court held that a habeas corpus petitioner must show "cause and prejudice" in order to advance in federal court those claims barred from consideration in the state courts by a valid procedural rule. The United States Supreme Court recently reaffirmed the *Sykes* doctrine in *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), recognizing that the costs of the federal writ of habeas corpus "are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts." 456 U.S. at 128, 102 S.Ct. at 1572.

The state argues that Booker's counsel did not adequately object at trial. During oral argument on this appeal, Booker's counsel, who has represented Booker throughout the state and federal proceedings, argued that the objection at trial was sufficient. Both parties also devoted considerable attention in their respective briefs to the "cause and prejudice" exception to *Sykes*.

[1] One rationale for the *Sykes* doctrine is the integrity of the state court trial. "The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Sykes*, 433 U.S. at 90, 97 S.Ct. at 2508. However, equally important underpinnings of the *Sykes* doctrine are considerations of comity and federalism. As recently stated in *Isaac*, without *Sykes'* requirement that defense counsel present constitutional claims during trial, the state appellate courts would not have a "chance to mend their own fences and avoid federal intrusion." *Isaac*, 456 U.S. at 129, 102 S.Ct. at 1572.

Considerations of comity and federalism have resulted in the development of a well settled exception to the procedural default rule of *Sykes*: where a state appellate court does not rely on a procedural default, but reaches the merits of the federal law claim, the *Sykes* bar is inapplicable. As explained by the United States Supreme Court, when the state courts do not indicate that a "federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." *County Court of Ulster County v. Allen*, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979). The former Fifth Circuit recognized this exception and applied it in numerous cases.[8] *See e.g., Sassoon v. Stynchombe*, 654 F.2d 371, 374 (5th Cir.1981); *Moran v. Estelle*, 607 F.2d 1140, 1142 (5th Cir.1979); *Cannon v. State of Alabama*, 558 F.2d 1211, 1216 n. 12 (5th Cir.1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978).

[2] The state contends that Booker did not adequately object at trial or present his federal constitutional claim on appeal to the Florida Supreme Court. The state further contends that no exception is applicable because "it is clear from the Florida Supreme Court's opinion that this issue was treated as a question of state evidentiary law rather than a federal constitutional question." (Brief of Appellee at 20, n. 3). We do not agree.

The Florida Supreme Court described Booker's position on appeal thusly:

> The defendant contends that during the sentencing proceedings the court committed error in permitting the prose-

8. We are bound by the precedent of the former Fifth Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981).

cutor to ask questions based on information gathered from court ordered psychiatric reports. The defendant argues that this violated his right against self-incrimination.

397 So.2d at 913. The Florida Supreme Court also noted that:

> The defendant recognizes that a court ordered psychiatric examination generally is not considered violative of defendant's right to freedom from compelled self-incrimination [9] and that psychiatrists may render opinions concerning sanity based on factual statements made by the defendant.

Id. In both the above references to the right against self incrimination, the right is referred to generally, without denominating whether it is specifically the right embodied in the Fifth Amendment to the United States Constitution or Florida Constitution, Article 1, Section 9. Booker's Initial Brief to the Florida Supreme Court mentions both sources *initially* and then refers to the right generally. In deciding the dispositive issue, the Florida Supreme Court concluded:

> A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him. *Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968).

397 So.2d at 914. By relying on *Harrison*, which did not concern Florida's privilege against self-incrimination,[10] the Florida Supreme Court was apparently considering both the state and federal constitutional privileges against self-incrimination. We therefore conclude that where a state court does not make explicit whether it is considering the federal constitutional provision or its state constitutional counterpart, and cites cases construing both, we will view the state court as having treated the issue as arising under both federal and state law for *Sykes* purposes. To hold otherwise would be to sanction an imprecision in jurisprudence intolerable in the realm of constitutional issues and to foreclose federal habeas review of federal claims because the language used by the state courts was vague.

Having decided that we are not barred by the procedural default doctrine of *Sykes*, we proceed to consider Booker's claim concerning the use of the psychiatric exam on the merits.

B. The Substantive Claim

Booker asserts that under *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), his constitutional privilege against self-incrimination was violated by the prosecutor's use of information allegedly gained from a psychiatric examination of Booker. In *Smith*, the United States Supreme Court held that

> when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to [the doctor] were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the state did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them.

Id. at 469, 101 S.Ct. at 1876. There is no contention that Booker was given *Miranda* or other suitable warnings before making statements to the psychiatrists who examined him.

[3] Neither Booker's mere submission to a psychiatric or psychological examination, nor the fact that the defense may have requested an examination forecloses his claim under *Smith*. *Battie v. Estelle*, 655 F.2d 692, 702 (5th Cir.1981). In *Battie*, however, the former Fifth Circuit distin-

9. This was the state of the law prior to *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

10. Harrison was convicted of murder in the District of Columbia and the Court was construing the Fifth Amendment to the United States Constitution.

guished a situation where the government used the results of a court-appointed psychiatric examination only after the defense had introduced psychiatric testimony in order to raise a mental defect defense, *citing, United States v. Cohen*, 530 F.2d 43 (5th Cir.) *cert. denied*, 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976).[11] *Battie* approved *Cohen's* holding that "the introduction by the defense of psychiatric testimony constituted a waiver of the defendant's fifth amendment privilege in the same manner as would the defendant's election to testify at trial." *Battie*, 655 F.2d at 702.

[4] In Booker's case, the issue of insanity was raised as a defense and a psychiatrist testified on behalf of the defendant. Thus, under *Battie*, there was a waiver of defendant's fifth amendment privilege as to psychiatric testimony. However, the jury had already rejected Booker's defense of insanity by finding him guilty on all three counts of the indictment and the use of the psychiatric testimony occurred during the subsequent penalty phase of the trial. We need not decide whether such a waiver under *Battie* during trial survives in the separate penalty proceeding in a capital case, since there is another determinative factor in Booker's situation.

Booker took the stand to testify during the advisory sentencing proceedings of the state trial. In answer to his attorney's specific inquiry as to whether he had a recollection of the day of the crime, Booker said he did not remember. Booker also testified that he had been in various hospitals, including Camp Codie Medical Center on Okinawa and Walter Reed Medical Center in Washington, D.C. while he was in the armed services. The following colloquy then occurred between Booker and his attorney:

Q: Have you had any difficulties during this time you were hospitalized from the time you were 13 until now with periods of time which you can't remember?

A: Yes, sir. Three of these occasions of hospitalization, that was the reason for being in the hospital.

Q: That you couldn't remember what had happened to you?

A: Yes, sir.

(State Transcript at 838). On cross examination, the prosecutor questioned Booker about his military service:

Q: Do [sic] you have problems with acts of violence while you were in the service?

A: Yes. I did.

Q: Other than these for fighting, have you ever attempted to kill people?

Q: While you were in Okinawa in the houses?

A: Could be.

Q: Do you know what I am talking about, Mr. Booker?

A: Yes.

Q: I'm talking about houses of prostitution. Did you ever try to kill anybody over there?

A: Not necessarily. I used to—we used to rob cat houses.

Q: What weapons did you use to hit people with?

A: Claw hammer.

Q: How many people do you think you hit with the claw hammer?

A: I can't recollect.

Q: More than five?

A: I would say about five.

Q: More than ten?

A: No.

(State Transcript at 841–42). Later, Booker's attorney objected to the prosecutor's questions relating to the day of the crime.

11. Writing five years prior to *Estelle v. Smith*, the Fifth Circuit in *Cohen* stated

> [w]e have never reached the issue of whether a defendant's privilege against self-incrimination is violated per se by a court ordered psychiatric examination solely to determine the accused's mental condition at the time of the commission of the offense. Several other circuits have rejected this unconstitutionality-per-se argument on various grounds, while one has indicated approval of it. Relying on a balancing test, we choose to follow the former line of cases and permit compelled psychiatric examinations when a defendant has raised the insanity defense. [footnotes omitted].

530 F.2d at 47.

The trial court overruled the objection on the grounds that the question of lapse of memory on the day of the incident was opened by the defendant on direct. The cross examination continued:

Q: Mr. Booker, my question to you was do you remember when you got up at 7:00 or 7:30 feeling that morning like you wanted to kill somebody?

A: Part of the way, yes.

Q: Did you know Mrs. Harman prior to this date?

A: No. I didn't.

Q: Had she ever done anything to you in her life to deny you anything or prevent you from anything?

A: No. In regards to me knowing her, I still don't know her. I have just been confronted with her in this courtroom in this charge.

Q: Did you attempt to kill anybody else that day; do you remember that?

A: Sure, I remember.

Q: Do you remember you did?

A: No. I didn't try to kill anybody that day.

Q: In the morning?

A: Right.

Q: You did not?

A: No. I didn't.

Q: Did you think about doing it?

A: Sometime I did, but I gave up the idea because it was crazy.

(State Transcript at 844–45)

Booker contends, and we assume without deciding, that the prosecutor obtained the information about the Okinawa houses of prostitution and Booker's state of mind upon waking on the day of the crime through information given to a psychiatrist [12] without the constitutional safeguards of *Estelle v. Smith*.[13] Yet even assuming Booker's statements would not have been admissible in the state's case, there is no constitutional prohibition against using the information for impeachment purposes. *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).[14] In *Harris*, the United States Supreme Court reasoned:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. [citations omitted]. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could be laid before the jury by way of cross examination and impeachment.
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances.

401 U.S. at 225–6, 91 S.Ct. at 645–646. Since "the holding in *Smith* followed logically from the *Miranda* decision itself," *Battie* 655 F.2d at 699, it is likewise logical to conclude that the shield provided by *Smith* is also not susceptible to being perverted into a license to use perjury free from permissible impeachment.

While the prosecutor's questions concerning events on Okinawa may have been susceptible to an objection as being outside the scope of direct examination,[15] the cross ex-

12. The Florida Supreme Court found that "the record does not conclusively show that the state attorney secured this information from the psychiatric reports." 397 So.2d at 914.

13. We have previously decided that *Smith* should be given retroactive effect. *Battie v. Estelle*, 655 F.2d at 699.

14. *See also, Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), (use of prearrest silence to impeach defendant does not violate privilege against self incrimination); *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980), (evidence suppressed as fruit of unlawful search and seizure may be used to impeach defendant's testimony given on cross examination).

15. The Florida Supreme Court, however, held that:

> The defendant opened up the question of what he remembered and whether he did or

amination questions do not rise to the level of a constitutional violation [16] and relief in a federal habeas action is therefore not warranted.

III. PRIOR ACTS OF VIOLENCE

[5] Booker contends that the Okinawa activities elicited on cross examination of Booker during the advisory sentencing proceeding requires granting of the writ on another basis. In *Henry v. Wainwright*, 661 F.2d 56 (5th Cir.1981),[17] we held that it is constitutional error to allow a jury in a capital case to consider nonstatutory aggravating factors in deciding whether the death penalty should be imposed. Booker seeks to extend *Henry* to situations where the jury is properly instructed to consider only statutory aggravating factors but evidence of a nonstatutory aggravating factor has been presented to the jury.

To adopt Booker's theory would be to presume that the jury did not follow the court's instructions listing the aggravating circumstances and specifically limiting the jury's consideration to those circumstances. There is no hint in the record that the jury would have construed the Okinawa impeachment testimony as a nonstatutory aggravating factor. We decline to posit a per se rule to the effect that the introduction of any evidence that might *possibly* be interpreted as a nonstatutory aggravating circumstance renders the imposition of the death penalty unconstitutional notwithstanding specific instructions limiting the jury's consideration to the enumerated statutory aggravating factors.

IV. JURY INSTRUCTIONS ON NON-STATUTORY MITIGATING FACTORS

[6] Booker argues that the trial court's instructions to the jury during the advisory sentencing proceedings improperly limited the jury's consideration of nonstatutory mitigating factors. The state argues that our consideration of this issue is barred by the procedural default doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Booker concedes procedural default as to the jury instructions, but contends that he comes within the cause and prejudice exception to *Sykes*.

This issue is controlled by *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc). In *Ford*, the trial judge similarly instructed the jury to consider *only* the enumerated aggravating factors and, omitting the "only," to consider the following mitigating factors. *Ford* also conceded procedural default in *Sykes*. In *Ford*, we stated:

> The *Sykes* issue becomes blurred in this case, however, because of two principles which mesh to deny Ford relief on this point. First, the Supreme Court has held that an erroneous jury instruction satisfies *Sykes'* prejudice prong only if actual, not possible, prejudice is shown so that there is 'actual and substantial disadvan-

did not remember certain things. The trial court was correct in ruling that the state attorney had a right to inquire as to what defendant remembered, as this was an issue presented by the defendant during the sentence proceedings.
397 So.2d at 914.

16. *Cf., Harris v. Spears*, 606 F.2d 639 (5th Cir. 1979), where we affirmed the granting of the writ of habeas corpus on the basis of the prosecutor's cross examination questions to defendant concerning statements attributed by implication to defendant's son. We stated "The constitutional error occurred, however, not when the questions were asked, but when the son was not called." *Id.* at 643. In *Harris*, the sixth amendment right to confrontation was determinative, a factor not applicable in *Booker*, since what is involved is Booker's statements.

17. This Unit B case decided November 12, 1981, is binding precedent for the Eleventh Circuit. *See, Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982). *Henry* was vacated and remanded to the Eleventh Circuit by the United States Supreme Court, — U.S. —, 102 S.Ct. 2922, 73 L.Ed.2d 1326, for further consideration in light of *Engle v. Isaac*. On remand, we found that the issue was properly before us and adhered "to our earlier judgment that the state trial court committed constitutional error by allowing the non-statutory aggravating circumstances to be placed before and considered by the jury at Henry's sentencing hearing." *Henry v. Wainwright*, 686 F.2d 311, 315 (5th Cir.1982) (Unit B).

tage, infecting his entire trial with error of constitutional dimensions.' *United States v. Frady*, 456 U.S. 152, 168, 102 S.Ct. 1584, 1595, 71 L.Ed.2d 816, 832 (1982).

Second, in evaluating a trial court's instructions, we must determine the interpretation a reasonable juror might give the words of the instruction in question. *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979). The entire charge must be examined as a whole to discern whether the issues and law presented to the jury were adequate. *Davis v. McAllister*, 631 F.2d 1256, 1260 (5th Cir.1980), *cert. denied*, 452 U.S. 907, 101 S.Ct. 3035, 69 L.Ed.2d 409 (1981).

The fundamental issue then is whether Ford has carried his burden in establishing that his jury perceived that in deciding whether to recommend life or death, it was denied the use of any nonstatutory mitigating factors.

696 F.2d at 812. As in *Ford*, we conclude that Booker has not carried his burden in establishing the jury perceived that in deciding to recommend life or death, it was denied the use of any nonstatutory mitigating factors. *Ford* set forth four reasons for this conclusion. Three of those reasons are applicable to Booker's case and bear repeating:

> *[F]irst*, the trial court read the statute as written, setting forth the entire list of statutory mitigating circumstances, which statute omits the word 'only.' The Supreme Court has recognized the Florida statute does not limit a jury's consideration of mitigating circumstances to those listed in the statute. *Proffitt v. Florida*, 428 U.S. [242] at 250 n. 8, 96 S.Ct. [2960] at 2965 n. 8 [49 L.Ed.2d 913].
>
> *Second*, the instruction here was different from *Washington v. Watkins*, 655 F.2d 1346 (5th Cir.1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982), where the state trial judge concluded the charge with these words:
>
> > If you unanimously find from the testimony that *one or more of the preceding elements of mitigation* exist[s], then you must consider whether *it* outweighs the aggravating circumstances you previously found and you must return one of the following verdicts....
>
> *Id.* at 1368 (emphasis added). Here the jury was not confined to two 'preceding elements of mitigation,' as in *Washington*.
>
> *Third*, that petitioner was not limited in the introduction of evidence which might be considered mitigating and that the jury arguments encompassed all evidence introduced in the case explains counsel's perception that the jury was not denied the use of any evidence in weighing sentences. Thus had petitioner known of *Lockett [v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973], he would still have no reason to object because the jury was not in fact being limited to what it could consider.

Id. at 812-13. As in *Ford*, the rational conclusion is that the jury did not perceive a restriction on the consideration of any mitigating circumstances.

V. NONRECORD MATERIAL BEFORE THE FLORIDA SUPREME COURT

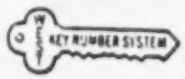
[7] The final issue raised by Booker concerning the Florida Supreme Court's consideration of nonrecord material is also controlled by *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc), where we stated:

> But even if members of the [Florida Supreme] court solicited the material with the thought it should, would or might be used in the review of capital sentences, the decision of the Florida court that it should not be so used, the statement that it should not be so used, and the rejection of the notion that it affected the judgment of the reviewing judges of the court ends the matter when addressed at the constitutional level.

Id. at 811. We note only that Booker's attorney was furnished with the Florida Supreme Court's request of Booker's presentence investigation report, thus rendering this factual situation even weaker than *Ford*.

VI. CONCLUSION

Based on the foregoing, the district court's denial of the petition for writ of habeas corpus is AFFIRMED.



ADP-FINANCIAL COMPUTER SERVICES, INC., Plaintiff-Appellee,

v.

The FIRST NATIONAL BANK OF COBB COUNTY, et al., Defendants-Appellants.

No. 82-8120.

United States Court of Appeals, Eleventh Circuit.

April 25, 1983.

A computer services company sued bank for failure to pay minimum monthly charges for on-line computer services. A jury in the United States District Court for the Northern District of Georgia, Charles A. Moye, Jr., Chief Judge, awarded plaintiff compensatory damages and concluded that bank had acted in bad faith or had been stubbornly litigious, for purposes of award of interest and litigation expenses, and bank appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) bank's purchase of computer and taking its data processing "in-house" was not a clear repudiation so as to constitute an anticipatory breach of contract whereby bank had been obtaining five categories of computer services from plaintiff, where bank continued to use plaintiff's service in two of the categories, and in absence of repudiation, the contract was not breached by bank's not requesting service in the remaining three categories; (2) since there was no breach of contract, computer services company was not required to prove actual damages or to mitigate its loss in order to recover the agreed to minimum monthly charge; (3) evidence supported finding of no accord and satisfaction when plaintiff cashed the checks from bank for services actually rendered; and (4) jury was authorized to conclude that bank had acted in bad faith, for purposes of award of fees and costs under Georgia law.

Affirmed.

1. Damages ⇐78(2)

Georgia law does not interpret contracts as providing for liquidated damages unless it is clear that the parties intended it, and while the words "liquidated damages" are not specifically required, some manifestation of the parties' intent to agree to liquidated damages is. O.C.G.A. § 13-6-7.

2. Damages ⇐78(1)

"Minimum monthly charge" provision in contract for providing computer services was not a "liquidated damages" provision under Georgia law but simply described the price to be paid for the services. O.C.G.A. § 13-6-7.

See publication Words and Phrases for other judicial constructions and definitions.

3. Contracts ⇐312(1), 313(1)

Bank's purchase of computer and taking its data processing "in-house" was not a clear repudiation so as to constitute an anticipatory breach of contract whereby bank had been obtaining five categories of computer services from outside company, where bank continued to use the outside service in two of the categories, and in absence of repudiation, the contract was not breached by bank's not requesting service in the remaining three categories, where nothing in the contract obligated bank to request services and the outside company was obligated to provide service only as requested.

4. Contracts ⇐229(1)

Where there was no breach of contract in bank's ceasing to use outside company for three of five categories of computer services provided under contract, computer services company was not required to prove

APR 20 1982

ATLANTA, GEORGIA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STEPHEN TODD BOOKER,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Secretary, Florida
Department of Corrections,

Respondent.

Received 4-20-82

TCA 82-831

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APR 20 1982
DEPT. OF LEGAL AFFAIRS
CRIMINAL DIVISION

ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS

Petitioner Stephen Todd Booker was convicted in the Circuit Court of the Eighth Judicial Circuit, in and for Alachua County, Florida, of first-degree murder, sexual battery, and burglary and sentenced to death. The Florida Supreme Court affirmed his conviction and sentence. The United States Supreme Court declined to review that decision. Governor Graham has signed Booker's death warrant, and Booker is scheduled for electrocution 7:00 a.m. April 21, 1982. Booker petitions under Title 28, United States Code, Section 2254, for a writ of habeas corpus, claiming five constitutional errors in the state court proceedings which culminated in the sentence of death. I find no merit in Booker's petition and dismiss it. Previously I denied a stay of execution. That denial is reaffirmed.

Alleged Restrictions on Mitigating Factors

In a death penalty proceeding the United States Constitution requires that "'the sentencer . . . [must] not be precluded from considering, as a mitigating factor, any

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Case No. 81-6200 (11th Cir. April 15, 1982) at 9, quoting Lockett v. Ohio, 438 U.S. 586, 604, 57 L.Ed2d 973, 990 (1978) (footnote omitted). Booker claims he was denied this constitutional protection by the trial judge expressly limiting consideration of mitigating factors to those listed in Florida's death penalty statute, section 921.141(6), Florida Statutes (1977); the judge's exclusion of evidence that Booker would have pled guilty to second degree murder; the instructions to the jury; and the prosecutor telling the jury it could consider only the statutory mitigating factors. This issue could have been raised in the state court proceedings but was not. Of all of Booker's complaints only one was raised at trial, the exclusion of evidence that he would have pled guilty to second-degree murder (T-839). His complaints about the prosecution's argument and the court's instructions on mitigating circumstances were not raised at trial (T-862, 876). None of these issues was raised in his direct appeal to the Florida Supreme Court. Brief for Appellant, Booker v. Florida, Fla. S. Ct. Case No. 55,568 (Fla. March 16, 1979). By not raising the issues in state court Booker has waived them. Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977); Huffman v. Wainwright, 651 F.2d 347 (5th Cir. 1981); cf. Engle v. Isaac, No. 80-1430 (U.S.S.Ct. April 5, 1982) (holding failure to comply with state's contemporaneous objection rule may waive alleged error).

Booker's claims of limitations of mitigating circumstances fail for two other reasons. The trial judge's instructions on mitigating circumstances were substantially identical to those found acceptable in Ford v. Strickland, supra.[1] Also, Booker was

allowed to present evidence of and argue to the jury about non-statutory mitigating circumstances. Although Booker was not allowed to testify that he would have pled guilty to second-degree murder (T-839), he was allowed to present similar evidence of remorse (T-835). His lawyer made use of that testimony in his argument (T-870, 871). Remorse is not a statutorily established mitigating circumstance. Neither are several of the other factors included in Booker's lawyer's appeal to the jury. They include the ineffectiveness of capital punishment as a deterrent (T-866, 872), the severity of life imprisonment without parole eligibility for 25 years as a death penalty alternative (T-864, 869), and the atrociousness of electrocution (T-872). Rather than being limited to the statutory mitigating circumstances, Booker was allowed to present a number of non-statutory mitigating circumstances.

Reliance on Invalid Aggravating Circumstances

Booker claims that admission of evidence of previous violent acts and testimony that Booker thought of killing someone earlier the day of the murder injected non-statutory aggravating circumstances into his sentencing proceeding. That and the prosecutor's statement that in his opinion the killing cried out for the death penalty and none of the mitigating circumstances applied, says Booker, are errors which denied him his rights under the Eighth and Fourteenth Amendments. The prosecutor's remarks were not objected to at trial (T-857, 862) or complained of on appeal. Brief for Appellant, supra. Review is foreclosed. Wainwright v. Sykes, supra; Engle v. Isaac, supra. Furthermore, the prosecutor's opinions were more than offset by Booker's lawyer's opinions (T-867, 868, 869, 872, and 873). And during the guilt phase the jury had been instructed to consider only the evidence and follow the court's instructions (T-811).

The evidence Booker objects to was brought out in cross-examination of him during the sentencing phase of the trial. The prosecutor asked Booker if he remembered getting up the morning of the murder feeling like he wanted to kill somebody (T-844). He admitted experiencing the desire but suppressing it (T-845). The question was allowed as impeachment of Booker's direct testimony that he could not remember what happened the day of the murder (T-835), and questioning on the subject was limited (T-845, 846).

All of Booker's complaints of non-statutory aggravating circumstances fail for another important reason. The jury was never instructed that facts like these could be considered as aggravating circumstances, and the judge's sentencing order does not rely on those facts. The evidence came in legitimately as impeachment during cross-examination. Nothing in the record indicates the jury was allowed to consider the evidence complained of as proof of an aggravating circumstance.

Felony Murder

Booker has two complaints about the role the felony murder theory played in his death sentence. First, he argues that he was sentenced in violation of his Eighth Amendment rights for a murder conviction based upon a felony murder theory rather than a jury determination that he deliberately took a human life. See, Coker v. Georgia, 433 U.S. 584, 53 L.Ed2d 982 (1977). That claim fails at the outset because the jury was not instructed on the felony murder theory. Booker's argument confuses felony murder, which makes a participant in a crime responsible for another participant's killing, with Florida's definition of first degree murder, which presumes premeditation if a murder is committed by someone in the course of committing a felony. §782.04(1), Fla.

Stat. (1977). Both the court's instructions and the prosecutor's arguments, as well as the evidence, addressed only theories of culpability which required the jury to find Booker personally committed the killing (T-758-763; 797; 800-802).

Second, Booker argues use of the contemporaneously committed felonies of burglary and sexual battery as predicates for aggravating circumstances denies him his rights under the Eighth and Fourteenth Amendments. The judge made two uses of those convictions in his findings of aggravation. One was in finding the murder was committed while he was engaged in committing or attempting to commit burglary or rape, or while fleeing after committing or attempting burglary or rape (T-228). The second was in finding the murder was committed for the purpose of avoiding or preventing a lawful arrest. Both these findings pertain to specifically defined aggravating circumstances, sections 921.141(5)(d) and (e), Florida Statutes (1977), which have been approved by the United States Supreme Court. Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913 (1976). There was no error in the state court's use of the felonies committed at the same time as the murder.

Florida Supreme Court's Clandestine Review of Secret Information

Booker alleges the Florida Supreme Court was in the habit of secretly obtaining and reviewing presentence investigation reports, psychiatric evaluations, psychological reports, postsentence investigation reports, probation or parole violation reports, and state prison classification and admissions summaries of capital defendants while his appeal was pending before it. This practice he claims denied him the due process guaranteed by the Fourteenth Amendment. His claim fails for a number of reasons.

Booker does not allege the Florida Supreme Court obtained secret information about him. Absent some factual allegation of wrongdoing I may not presume the Florid Supreme Court acted improperly. See, 28 U.S.C. §2254(d); Sumner v. Mata, 449 U.S. 539, 66 L.Ed.2d 722 (1981), after remand, 50 U.S.L.W. 3760 (March 23, 1982). This is particularly true in Booker's case since the opinion affirming his death sentence was issued after the Florida Supreme Court had ruled in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied, 50 U.S.L.W. 3349 (November 3, 1981), that secret information, if obtained, would not affect its review of death sentences. Finally the Eleventh Circuit has ruled that the Florida Supreme Court's opinion in Brown v. Wainwright, supra, is correct. Ford v. Strickland, Case No. 81-6200 (11th Cir. April 15, 1982). Booker's claim on this issue does not entitle him to relief.

Cross-Examination Based Upon Information Gained from Court Ordered Psychiatric Examinations

The cross-examination questions about Booker robbing houses of prostitution while in the army and feeling on the day of the murder like he wanted to kill somebody discussed earlier are also the subject of Booker's claim he was denied his Fifth Amendment right to not incriminate himself. Booker alleges the prosecutor's knowledge of this information could only have come from the court ordered psychiatric examinations. This issue was correctly resolved by Justice Adkins in the Florida Supreme Court's opinion affirming Booker's conviction and sentence. "A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives . . .." Booker v. State, 397 So.2d 910, 914 (Fla. 1981). The questions complained of were relevant impeachment of Booker's testimony. There was no Fifth Amendment violation.

Conclusion

After examination of the state court records and consideration of the applicable law, I find the matters set forth in Booker's petition for a writ of habeas corpus do not entitle him to relief. The petition is denied.

This ruling is not a reflection upon his lawyer Stephen Bernstein, who has done a thorough, workmanlike job for Booker. Mr. Bernstein, like lawyers I have seen in other death penalty cases, impresses me and is a credit to the legal profession. These lawyers take on extraordinarily difficult, highly unpopular, emotionally charged cases on short notice, under the most adverse circumstances. Nonetheless, the quality of their work is better than that of most lawyers appearing regularly in this court. They are ethical and honest and a help to the court. Mr. Bernstein and lawyers like him deserve the respect and assistance of the entire bar. So long as the State of Florida persists in ignoring reality by refusing to provide defendants sentenced to death legal assistance in their collateral litigation, I hope for the sake of our judicial system, our constitutional guarantees, and the rights of the defendants that there will be lawyers of Mr. Bernstein's caliber to help these defendants.

DONE AND ORDERED this 19th day of April, 1982.

LYNN C. HIGBY
UNITED STATES DISTRICT JUDGE

(Footnote Attached)

BOOKER v. WAINWRIGHT
TCA 82-831
Order Denying Petition for
Writ of Habeas Corpus

FOOTNOTE

1 The judge told the jury:

> If you find one or more of these aggravating circumstances exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances.
>
> The mitigating circumstances you may consider if established by the evidence are as follows:
>
> [The statutory established mitigating circumstances are described.]
>
> * * * *
>
> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that such [sic] evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.
>
> The sentence you recommend to the Court must be based on the facts as you find them from the evidence and the law as given to you by the Court. Your advisory sentence must be based upon your finding of whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances. Based upon these considerations, you should advise the Court whether the sentence of life imprisonment or to death. [sic]

(T-876-878).

No. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

1981 Term

STEPHEN TODD BOOKER,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

RECEIVED
JUL 20 1981
ATTORNEY GENERALS OFFICE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Docketed
7-20-81

STEPHEN N. BERNSTEIN
JOHNSON, BERNSTEIN & BINGHAM
725 Northeast First Street
Gainesville, Florida 32601
904/376-3297

ATTORNEY OF RECORD

QUESTIONS PRESENTED

1. Whether the petitioner was denied his Fifth Amendment rights against self-incrimination when the trial court permitted the prosecutor to cross-examine him based upon information gathered from a Court ordered psychiatric report?

2. Whether the petitioner was denied his Fifth and Fourteenth Amendment rights to due process of law when prosecuted pursuant Florida Statute §921.141 where there were insufficient constitutional standards of reliability in the fact finding process?

3. Whether the petitioner was denied his Eighth Amendment rights, protection against cruel and unusual punishment under a Florida Statute §922.10, which provides for death by electrocution as punishment?

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IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1981

STEPHEN TODD BOOKER,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE UNITED STATES

Petitioner, Stephen Todd Booker, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 397 So. 2d 910 (Fla. 1981) and is attached hereto as an Appendix A.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on March 19, 1981. A timely petition for rehearing was denied on June 3, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> "No person . . . shall be compelled in criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law;"

and the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law;"

2. This case also involves the following provisions of the statutes of Florida:

> "§ 921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence
>
> (1) Separate proceedings on issue of penalty,-- upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized in s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsection (6) and (7). Any such evidence which

the court deems to have probative value may be received, regardless of its admissibility under the exclusionary fules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist, and;

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

(4) Review of judgment and sentence.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the

Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the persons.

(c) The defendant knowingly created a great risk or death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capicity of the defendant to appreciate

the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime."

STATEMENT OF THE CASE

The petitioner was arrested on November 11, 1977, for the charge of murder. A motion for mental exam and notice of defense of insanity was filed November 15, 1977. On November 22, 1977, the petitioner was committed to intake facilities for competency evaluations and was appointed experts to examine him on the issue of sanity. An additional psychiatric expert was appointed to examine the petitioner on March 3, 1978.

The trial began on June 19, 1978 and continued through June 21, 1978, as a result of which the jury returned verdicts of guilty as to murder in the first degree, sexual battery, and burglary.

On June 22, 1978, during an advisory sentencing proceeding, the petitioner testified on direct examination that he did not have a recollection of the events that occurred on the day of the murder. He further indicated that he did not remember committing the acts which were charged against him, but if he did commit them, that he was remorseful about them. The remaining direct examination dealt solely with the several times he was hospitalized for mental difficulties. (R-836, R-838) The prosecutor during this proceeding cross-examined the petitioner concerning facts raised only during a psychiatric mental examination, which was court ordered in this case. The questions of the prosecutor, rather than going to the issue of mental illness or insanity, went to factual matters of alleged acts of violence committed

by the petitioner during his military career in Okinawa. This information can be found only in the confidential reports of the psychiatrists, Drs. Barnard and Carrera.

It is clear that the prosecutor was referring to this confidential matter in the following exchange:

> Question: "Did you have any problems with acts of violence while you were in the service?"
> Answer: "Yes, I did."
> Question: "Other than needs for fighting, have you ever attempted to kill people?" (R-841.)
> Answer: "No."
> Question: "While you were in Okinawa in the houses?"
> Answer: "Could be."
> Question: "You know what I'm talking abount, Mr. Booker?"
> Answer: "Yes."
> Question: "I'm talking about houses of prostitution. Did you ever try to kill anybody over there?"
> Answer: "Not necessarily. I used to -- we used to rob cat houses."
> Question: "What weapons did you use to hit people with?"
> Answer: "Claw hammers." (R-842.)

During this June 22, 1978 advisory sentencing proceeding, the jury was instructed according to the standard jury instructions set out for Florida Statute section 921.141. After hearing the testimony and the court's instruction, the jury recommended death as punishment.

A motion for new trial was filed on behalf of the petitioner. Also, motions to exclude death as punishment; memorandum in support of motion; motion to declare section 922.10 of Florida Statutes unconstitutional were filed by the petitioner. On September 15, 1978, the trial court entered an order denying the petitioner's post trial motions.

On October 20, 1978, the trial court announced its judgment and sentence and sentenced the petitioner to death.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. On appeal to the Supreme Court of Florida, petitioner specifically urged that he was denied his protections

against self-incrimination as embodied in the Fifth Amendment of the United States Constitution when he was cross-examined concerning information gathered from a court ordered psychiatric examination. The Supreme Court of Florida stated that the petitioner testified on direct examination that he had "no recollection" as to what happened on the day of the homicide. The court also noted that the petitioner stated he had been hospitalized on eight times in the past and that during those times, he could not remember the reasons for being in the hospital. The Florida Supreme Court indicated that these statements on direct examination opened the door for the prosecutor to question the petitioner under the broad subject area of what the petitioner could or could not recollect. The Florida Supreme Court, however, did not comment on the relevancy of questionings directed towards recollections of an event in Okinawa some three years prior to the homicide and how such questions would be in any way helpful to the issues to be decided in that proceeding.

Defense counsel objected to the unfair use of such statements where the purpose was not the determination of sanity or insanity, but rather the attempted eliciting of information which did not fall within any statutory aggravating or mitigating circumstance and did not explore, through cross-examination, any area discussed on direct examination.

2. On appeal to the Supreme Court of Florida, the petitioner urged that Florida Statute section 921.141, provided insufficient constitutional standards of reliability in fact finding to justify the imposition of a death penalty as punishment, citing the case of Lockett v. Ohio, 438 U.S. 586 (1978). The Supreme Court of Florida held that this argument should be rejected out of hand. 397 So. 2d at 918.

3. On appeal to the Supreme Court of Florida, the petitioner urged that Florida Statute section 922.10 was unconstitutional in that it provided for punishment which was cruel and unusual, in violation of the Eighth Amendment to the United States Constitution. The Supreme Court of Florida rejected the contention that death by electrocution was cruel or unusual. 397 So. 2d at 918.

REASONS FOR GRANTING THE WRIT.

I.

PETITIONER WAS DENIED HIS FIFTH AMENDMENT RIGHTS AGAINST SELF-INCRIMINATION WHEN HE WAS FORCED TO TESTIFY AS TO INFORMATION GATHERED FROM COURT ORDERED PSYCHIATRIC REPORTS.

In affirming petitioner's conviction, the Supreme Court of Florida decided a substantial "federal question in a way in conflict with applicable decisions of this Court." It held, contrary to Estelle v. Smith, 29 Cr.L. 3031 (May 18, 1981), that at the sentencing phase of a capital trial, the prosecution may use evidence based on psychiatric examinations when such information went to issues other than the question of sanity or insanity of the defendant. In the case at bar, the petitioner took the witness stand at the advisory sentence proceedings held on June 22, 1978. During cross-examination, counsel for the petitioner objected to questions based upon information within confidential psychiatric reports prepared by a court appointed expert. (R. 880)

The first objectionable area involved statements by the petitioner concerning previous acts of violence while in Okinawa in the Armed Forces. In a psychiatric report based on interviews with the petitioner, Dr. George Barnard (R-898) reported that the appellant was "asked if he had any

ence in real life where he had shown violence to
, and he replied that he had, while in the Army. He
hat while in Okinawa he would go into towns and take a
ammer with him; he would then tip-toe into a whore-
and beat anyone he could find."

In a supplemental report filed by Dr. Barnard, the
information was noted: "He was asked if he ever killed
e else and he said no but he had hit people with a
r and never found out what had happened to them. He
ht he may have hit a dozen people in this manner on
erent occasions. This occurred in whorehouses while he
in Okinawa." (R-901)

Dr. Frank Carrera also interviewed the petitioner,
uant to court order and stated in his report: "Mr.
er denied killed anyone before. While stationed in
awa he said he used to go to whorehouses armed with a
ner and beat people with the hammer. He thought he might
e done this a dozen times." (R-908)

It is clear that the prosecutor was referring to
s confidential matter in the following exchange during
ss-examination:

> Question: "Did you have problems with acts of violence while you were in the service?"
> Answer: "Yes, I did."
> Question: "Other than needs for fighting, have you ever attempted to kill people?" (R-841)
> Answer: "No."
> Question: "While you were in Okinawa in the houses?"
> Answer: "Could be."
> Question: "You know what I'm talking about, Mr. Booker?"
> Answer: "Yes."
> Question: "I'm talking about houses of prostitution. Did you ever try to kill anybody over there?"
> Answer: "Not necessarily. I used to -- we used to rob cat houses."
> Question: "What weapons did you use to hit people with?"
> Answer: "Claw hammers." (R-842)

The second area of contention concerns statements

about the morning of Noverber 9, 1977. Dr. Barnard's report states: "On the day of the alleged crime, he awoke about 7:00 or 7:30 in the morning, and on that morning he specifically went to the houses of two different people in order to kill someone, but at each house decided against the act." (R-900) Dr. Carrera's report quotes: "I was mad that day . . . I got up at 7 o'clock or 7:30 . . . I went to kill somebody that morning . . ." (R-907)

Again, the prosecutor's cross-examination of the petitioner followed the psychiatric report:

> Question: "Mr. Booker, my question to you was do you remember when you got up at 7 o'clock or 7:30 feeling that morning like you wanted to kill somebody?"
> Answer: "Part of the way, yes." (R-844)
> Question: "Did you attempt to kill anyone else that day; do you remember tnat?"
> Answer: "Sure, I remember."
> Question: "Do you remember you did?"
> Answer: "No I didn't try to kill anybody that day."
> Question: "In the morning?"
> Answer: "Right."
> Question: "You did not?"
> Answer: "No, I didn't."
> Question: "Did you think about it?"
> Answer: "Sometimes I did, but I gave up the idea because it was crazy." (R-845)

The questions posed by the prosecutor in the case at bar were not addressed to the issue of sanity. These questions were specifically directed towards factual admissions made by the petitioner during court ordered psychiatric examinations.

The testimony of the petitioner during direct examination began with the statement that he did not have any recollection of the events that occured on November 9, 1977. The petitioner stated that although he did not remember committing the acts charged against him, if he did commit those acts, he was remorseful about them. (R-835) The remaining direct examination dealt solely with the several

petitioner was hospitalized for mental difficulties.
, R-838) The petitioner submits that this direct
ation in no way opened the door for the prosecutor to
e about specific information prejudicial to the peti-
when such inquiries were based upon information
l from confidential reports of court ordered psychiatric
nations.

This area of question has been commented on in the
al Courts. In the case of Collins v. Auger, 428 F.
, (S.D. Iowa, 1977) the defendant, under criminal
ge, had been committed to a hospital for mental treatment.
ng the trial, a treating physician was examined as to
ements made during treatment. In discussing the concept
undamental fairness the court stated: "In this court's
ion, it is fundamentally unfair to use defendant's
riminating admissions to a psychiatrist during a psychiatric
nination as part of the prosecutor's case to prove his
lt . . . the fundamental unfairness of the introduction
such evidence violates defendant's right to due process
er the Fourteenth Amendment to the Constitution of the
ted States.

Id. at P.1082.

The court said this unfair practice was analogous
using a defendant's testimony at a pre-trial suppression
aring in a trial to determine guilt, a procedure rejected
this court in Simmons v. United States, 390 U.S. 377, 88
Ct. 967, 19 L.ED. 2d 1247 (1968). The Collins opinion
rther noted:

> "Congress solved this problem for federal courts in psychiatric examinations to determine a defendant's mental capacity to stand trial by providing: "No statements made by the accused in the course of

any examination into his sanity or mental competancy provided for in this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

18 U.SC. § 4244

The object of the privilege against self incrimination is to (In)sure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed the crime. The privilege is limited to criminal matters, but is as broad as the mischief against which it seeks to guard."

Counsel v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.ED. 1110 (1892). See also Maness v. Myers, 419 U.S. 449, 461; 95 S.Ct. 584, 42 L.ED. 2d 574 (1975)."

Id. at p. 1083.

This Court in Estelle v. Smith, supra, held that the Fifth Amendment privilege against self-incrimination was directly involved when the State used as evidence against the respondent the substance of his disclosures given during a court ordered psychiatric examination. This opinion clearly stated that there was no basis for distinguishing between the guilt and penalty phases of trial insofar as the Fifth Amendment privilege is concerned.

II.

PETITIONER WAS DENIED HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW BECAUSE FLORIDA STATUTE SECTION 921.141 PROVIDED INSUFFICIENT STANDARDS OF RELIABILITY IN THE FACT FINDING PROCESS.

The Fifth and Fourteenth Amendments to the United States Constitution provide that "no person . . . shall be deprived of life, liberty or property without due process of law". This Court in Lockett v. Ohio, 438 U.S. 586 (1978), reversed the proceedings of the Ohio Court systems to the extent that they sustained the imposition of the death

penalty in that case. Lockett struck down the Ohio death penalty statute and the plurality opinion concluded that the statute was too narrowly confined in the range of mitigating circumstances which the sentencing authority could consider. This same plurality opinion, authored by Chief Justice Berger, reviewed previous capital punishment decisions and noted that "the signals from this Court have not . . . always been easy to decipher". Justice Berger indicated in his decision that he wanted to put aside his "previously differing views" and attempt to unite a majority behind a clear rationale which the States could follow.

The Chief Justice wrote . . ."the penalty of death is qualitatively different from any other sentence. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed".

Id. at 3220.

Mr. Justice Marshall in his concurring opinion states "Permitting imposition of the death penalty solely on proof of felony - murder, moreover, necessarily leads to the kind of 'lightning bolt, freakish, and wanton' executions that persuaded other Members of the Court to join Mr. Justice Brennen and myself in Furman v. Georgia, 408 U.S. 238 (1972), in holding Georgia's death penalty statute unconstitutional. Whether a death results in the course of a felony (thus giving rise to felony - murder liability) turns on fortuitous events do not distinguish intention or moral culpability of the defendants."

Mr. Justice White in his concurring opinion takes this one step further in stating ". . . that it violates the Eighth Amendment to impose the penalty of death without a

finding that the defendnat possessed a purpose to cause the death of the victim.

It is now established that a penalty constitutes cruel and unusual punishment if it is excessive in relation to the crime for which it is imposed."

The Justices in their opinions appear to indicate that the reliability in the process is mandatory before death is appropriate as a penalty. The further indications are that there is a distinction to be made between intentional premeditated murders and those that involved proof of a felony - murder situation and therefore, there is a need to have a factual distinction or finding made to determine which situation exists prior to the imposition of any death sentence for any killing.

Florida Statute 921.141 which provides the procedure by which mitigating and aggravating circumstances are to be considered by the jury in making a recommendation as to whether death is an appropriate penalty does not provide for any such fact findings to be made on the part of the jury.

The only guidance offered comes from the Florida Standard Jury Instruction at page 79:

> "Aggravating Circumstances must be established beyond a reasonable doubt before they may be considered by you."

However, there is no provisions for any specification as to which standard for evaluation of what degree some circumstances may outweigh one another.

It is inherent in the requirement that a jury is employed in this procedure that such evaluations should be mre than a mere numerical addition of aggravating and

mitigating circumstances. Nevertheless, Florida Statute Section 921.141 offers no guidance to a jury charged with rendering an advisory opinion. The advisory jury is not even required to state that they found as fact finders that the aggravating circumstances outweigh the mitigating circumstances by whatever standard they applied when advising the imposition of death as punishment.

Absent such findings of fact there is not a sufficient degree of reliability provided for a sentence which would be in proportion to the qualitative difference that exists between death and other penalties under the law.

III.

PETITIONER WAS DENIED HIS EIGHTH AMENDMENT RIGHTS IN A SENTENCE OF DEATH PURSUANT TO FLORIDA STATUTE SECTION 922.10

The petitioner was convicted of Murder in the First Degree under Section 782.04 (1)(a) Florida Statute (1975), a Capital felony requiring the imposition of a sentence of life imprisonment or death, Section 775.082, Florida Statute (1975). The sentencing procedure was governed by Section 921.141 Florida Statutes (1975) and death was the sentence imposed by the lower court. This sentence is mandated to be carried out by means of electrocution pursuant to Section 922.10 Florida Statutes (1975). The petitioner here asserts that death by electrocution is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and also in violation of Article I, Sections 9 and 17 of the Florida Constitution.

The Supreme Court in Gregg v. Georgia, 96 S.Ct. 2909, at 2925, (1976), stated the following:

"A penalty . . . must accord with the
of man', which is the basic concept underlining
the Eighth Amendment. Trop v. Dulles, 356 U.S. at
100, 78 S.Ct. at 597 (Plurality Opinion). This
means at least, that the punishment not be 'excessive'.
When a form of punishment in the abstract . . .
rather than in the particular . . . is under
consideration, the inquiry into 'excessiveness'
has two aspects. First, the punishment must not
involve the unnecessary and wanton infliction of
pain. Furman v. Georgia, 408 U.S. at 392, 393 92
S.Ct. at 2805 - 2806 . . . Second, the punishment
must not be grossly and out of proportion to the
severity of the crime."

The Gregg Court went on to say that although the legislature cannot be required to select the least severe penalty possible it shall be required to select a penalty which is not cruelly inhumane or disproportionent to the crime involved. The American Draftsmen who adopted the phrasing in the Eighth Amendment to the United States Constitution were primarily concerned with proscribing

"Tortures and other barbarous methods of punishment".

However, the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Gregg v. Georgia, supra.

Death by electrocution involves the unnecessary and wanton infliction of pain and does not meet the evolving standards of decency which mark the progress of our maturing society. There exists today means of execution which do not require the infliction of such needless pain and suffering. One example of a more humane means is that of lethal injection, now specifically prescribed by several of the states in our union and also urged for consideration by the present Attorney General for the State of Florida.

Conclusion

For the foregoing reasons, this writ of certiorari should be granted.

Respectfully submitted,

JOHNSON, BERNSTEIN & BINGHAM, P.A.

BY: _____

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ATTORNEY OF RECORD

APPENDIX A

Booker v. Florida
397 So. 2d 910 (Fla. 1981)

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

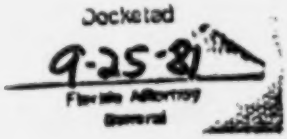
STEPHEN TODD BOOKER,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.



ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT STATE OF FLORIDA IN OPPOSITION TO PETITION FOR CERTIORARI

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1. WHETHER PETITIONER, WHO VOLUNTARILY TESTIFIED DURING THE SENTENCING PHASE OF HIS CAPITAL MURDER TRIAL AND WAS CROSS-EXAMINED BY THE STATE ON MATTERS WHICH HAD BEEN BROUGHT OUT ON DIRECT EXAMINATION BY DEFENSE COUNSEL, HAD WAIVED HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION?

2. WHETHER § 921.141, FLA.STAT., DENIED PETITIONER DUE PROCESS OF LAW IN THE SENTENCING PHASE OF HIS CAPITAL MURDER TRIAL WHEN THE JURY RETURNED AN ADVISORY VERDICT TO THE TRIAL COURT AFTER DETERMINING WHETHER THERE WERE SUFFICIENT MITIGATING CIRCUMSTANCES TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCES FOUND TO HAVE EXISTED?

3. WHETHER PETITIONER'S SENTENCE OF DEATH BY ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

PARTIES

In the Supreme Court of Florida, Petitioner was the appellant and the State of Florida was the appellee.

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CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported as Booker v. State, 397 So.2d 910 (Fla. 1981).

STATEMENT OF THE CASE

Respondent does not accept Petitioner's Statement of the Case and instead tenders the following statement of the case and facts as set forth by the Supreme Court of Florida in its opinion in Booker v. State, 397 So.2d 910 (Fla. 1981):

> This is an appeal from a judgment adjudicating defendant guilty of murder in the first degree and an order imposing a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. (1972).
>
> Defendant was also adjudged guilty of sexual battery and burglary, receiving a sentence of fifty-five years for sexual battery and thirty-five years for burglary.
>
> The victim, an elderly woman, was found dead in her apartment in Gainesville, Florida. The cause of death was loss of blood due to several knife wounds in the chest area. Two knives, apparently used in the homicide, were embedded in the body of the victim. A pathologist located semen and blood in the vaginal area of the victim and concluded that sexual intercourse had occurred prior to death. The apartment was found to be in a state of disarray; drawers were pulled out and their contents strewn about the apartment. Fingerprints of the defendant were positively identified as being consistent with latent fingerprints lifted from the scene of the homicide. The defendant had a pair of boots which had a print pattern similar to those seen by an officer at the scene of the homicide.
>
> Test results indicated that body hairs found on the clothing of the defendant at the time of his arrest were consistent with hairs taken from the body of the victim.
>
> After being given the appropriate warnings, the defendant made a statement, speaking as an alternative personality named "Aniel." The

"Daniel" character made a statement that "Steve had done it."

The indictment returned by the grand jury charged defendant with murder in the first degree, sexual battery, and burglary. A motion for mental examination and notice of defense of insanity were filed on behalf of the defendant and he was examined by three psychiatrists.

The defendant entered a plea of not guilty, but did not testify during the guilt phase of the trial. He was found guilty on all three counts of the indictment.

During the sentencing phase of the proceedings the defendant testified. At the conclusion of his testimony, and against the advice of his attorney, the defendant made a statement to the jury saying, "A defendant found guilty of such a crime should receive the death penalty." The jury recommended the death penalty and defendant was sentenced to death. This appeal resulted.

The defendant contends that during the sentencing proceedings the court committed error in permitting the prosecutor to ask questions based on information gathered from court ordered psychiatric reports. The defendant argues that this violated his right against self-incrimination. During the sentence hearing the defendant testified on direct examination that he had "no recollection" as to what happened on the day of the homicide. He stated that he had been hospitalized eight times in the past. During the times that he was hospitalized from the age of thirteen until now, the defendant said he could not remember the reasons for being in the hospital. He testified that on three of the occasions his lack of memory was "the reason for being in the hospital." On cross-examination the defendant testified that he did not consider himself a violent person, but that he did have problems with acts of violence while in the service. He denied that he attempted to kill people, but admitted that while in Okinawa he robbed houses of prostitution and used a claw hammer with which to hit people. He admitted that he hit about five people. The prosecutor then asked defendant if he remembered "getting up feeling like he wanted to kill someone that day." His counsel objected at that point, contending that the prosecutor was seeking to

> elicit information contained in the reports of the psychiatrist and such information was privileged. The court ruled that the question went toward the defendant's lapse of memory on the day of the incident and was proper cross-examination. Finally, when asked if he thought about killing anyone that day, the defendant responded, "Sometime I did, but I gave up the idea because it was crazy."

Id. at 912,913.

JURISDICTION

The jurisdiction of this Court is asserted under 28 U.S.C. §1257(3).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

PETITIONER WAS NOT DENIED HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION WHEN THE STATE WAS ALLOWED TO CROSS-EXAMINE HIM CONCERNING MATTERS BROUGHT OUT ON DIRECT EXAMINATION BY DEFENSE COUNSEL AFTER PETITIONER VOLUNTARILY TESTIFIED DURING THE SENTENCING PHASE OF HIS TRIAL.

Petitioner has contended that he was denied his Fifth and Fourteenth Amendment right against self-incrimination when he was cross-examined by the State after he voluntarily testified during the sentencing phase of his trial. The substance of Petitioner's complaint is his contention that he was cross-examined on confidential material found only in psychiatric reports. However, the Supreme Court of Florida found that the record did not support Petitioner's contention:

> During the cross-examination there was no reference made by the prosecutor to the psychiatrist or to the psychiatric reports. The defendant opened up the question of what he remembered and whether he

> did or did not remember certain things. The trial court was correct in ruling that the state attorney had a right to inquire as to what defendant remembered, as this was an issue presented by the defendant during the sentence proceedings. Furthermore, the record does not conclusively show that the state attorney secured this information from the psychiatric reports.

Id. at 914.

Moreover, it is not clear that Petitioner's objection was preserved as required by Florida's contemporaneous objection rule. Wainwright v. Sykes, 433 U.S. 72 (1977). The State's cross-examination of Petitioner began with general questions concerning Petitioner's hospitalization for mental difficulties. The fact that Petitioner had been hospitalized at least three times for mental problems was brought out on direct examination by defense counsel (R 836). Petitioner also volunteered that he had been hospitalized twice while in the Army in Okinawa (R 837). The State then cross-examined Petitioner about his activities in Okinawa which involved going into houses of prostitution and striking people with claw hammers. This testimony was not objected to (R 842). Cross-examination continued concerning Petitioner's alcohol problems and the fact that he had been in an alcohol treatment center in Gainesville prior to his commission of the murder (R 843). It was not until the State questioned Petitioner about his activities on the day of the murder that defense counsel objected. The record reveals that there was an unreported bench conference (R 844). At the conclusion of the cross-examination and after the jury had been instructed, Petitioner's counsel stated his objections for the record. However, counsel's specific objection concerned questions about the day of the murder rather than what had occurred in Okinawa:

> MR. BERNSTEIN: Your Honor, for the record if I may--
>
> THE COURT: Yes. It was under-

> stood that you had a motion that you would make at this time that would be considered the same as if you had made it at the appropriate time.
>
> MR. BERNSTEIN: Thank you, Your Honor. At this time I would move to strike all of the cross-examination on the part of Mr. Hebert I had based on confidential information supplied by psychiatric reports in this case. Specifically I refer to questions that related to activities during the morning of November 9th, 1977 and what actions took place during that morning or what statements may have been made or what thoughts may have been had.

(R 880).

The assistant state attorney argued that he had not mentioned the psychiatric reports, and he stated that some of the questions had come from sources other than the psychiatric reports (R 881). In any event, the trial court ruled that defense counsel had opened up the questions concerning Petitioner's memory (R 882), and Petitioner's motion to strike was denied. The State has included Petitioner's direct examination during the sentencing phase and the relevant portion of the cross-examination in the Appendix (A 1-10). Also, defense counsel's motion to strike and the trial court's ruling have been included at pages (A 11-13).

Should, however, the court decline to find that a valid and independent state ground exists on this point because of Pettioner's failure to comply with Florida's contemporaneous objection rule, Petitioner's argument must fail on the merits. This is because Petitioner voluntarily testified, and it is fundamental that a defendant who chooses to testify waives his privilege against compulsory self-incrimination, regardless of why the defendant was motivated to testify. Harrison v. United States, 392 U.S: 219, 222 (1968). The Court has previously held that a defendant's statements made in response to proper cross-

examination which is reasonably suggested by the defendant's direct examination are subject to impeachment by the prosecution -- even if the evidence used to impeach has been illegally obtained or is otherwise inadmissible as substantive evidence of guilt during the prosecution's direct case. United States v. Havens, 446 U.S. 620, 628 (1980). When defense counsel opens the door during direct examination, a criminal defendant's credibility can be attacked by the prosecution just like any other witness. Walder v. United States, 347 U.S. 62 (1954).

Finally, Petitioner's case does not present the issue decided in Estelle v. Smith, ___ U.S. , ___ 68 L.Ed.2d 359 (1981). In that case, the state used psychiatric reports during the sentencing phase as evidence of "future dangerousness" to support the imposition of the death penalty. In Petitioner's case, however, there was no direct mention of the psychiatric reports and the questions now found objectionable stemmed from matters brought out on direct examination by defense counsel. It should also be noted that the psychiatrists' reports were requested by the Petitioner who filed a Motion for Mental Examination and Notice of Defense of Insanity approximately one week after the murder (R 4-5, A- 14-15). See Estelle v. Smith, supra, at 68 L.Ed.2d 370, where the Court stated that in a similar type context the Fifth Amendment does not become an issue.

In summary, the Supreme Court of Florida found that the record did not conclusively show that the objected to testimony concerned information derived only from psychiatric reports. The Supreme Court of Florida also found that Petitioner had voluntarily waived his right against self-incrimination when he took the stand and testified during the sentencing phase of the trial. These conclusions are supported by the record and do not present a substantial federal question. Review should not be granted on this issue.

II

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW DURING THE SENTENCING PHASE OF HIS CAPITAL MURDER TRIAL WHEN THE JURY RETURNED AN ADVISORY VERDICT TO THE TRIAL COURT AFTER DETERMINING WHETHER THERE WERE SUFFICIENT MITIGATING CIRCUMSTANCES TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

Petitioner next contends that he was denied due process of law because § 921.141, Fla.Stat., provides insufficient standards of reliability in the fact finding process. Apparently, the gravamen of Petitioner's complaint is that the jury which renders an advisory opinion concerning whether the death penalty should be imposed is not provided sufficient standards from which to make its recommendation.

However, this argument has previously been raised and has been squarely rejected by this Court. In Proffitt v. Florida, 428 U.S. 242, 258 (1976), the Court stated:

> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Id.

Moreover, Petitioner has overlooked the fact that it is the trial court, not the jury, which is the sentencing authority in Florida. As this Court noted in Proffitt, supra, judicial sentencing should be even more consistent in the imposition of a capital sentence because a trial judge is more experienced in sentencing than a jury. Id. at 428 U.S. 252. As this Court found in Proffitt, Florida's trial judges are afforded specific and detailed guidance to assist them in determining whether to impose a death sentence or sentence of life imprisonment. Id.

constitutional muster, and Petitioner has failed to demonstrate that he was denied due process of law. Review should not be granted on this point.

III

WHETHER PETITIONER'S SENTENCE OF DEATH BY ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

Petitioner's final argument concerns his unsupported contention that death by electrocution constitutes cruel and unusual punishment. This argument has also been squarely rejected by this Court several times. See In Re: Kemmler, 136 U.S. 436 (1890); McElvaine v. Brush, 142 U.S. 155 (1891); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).

CONCLUSION

Petitioner's argument that he was denied his Fifth Amendment right against self-incrimination is without merit. He voluntarily testified in his own behalf, and his testimony opened the door for cross-examination upon matters brought out on direct examination. Thus, he waived his right against compulsory self-incrimination. Harrison, supra. Second, Petitioner's contention that he was denied due process of law because of the sentencing procedure is also without merit. This is because in Florida the trial court is the authority which imposes the sentence of death and because this Court has already concluded that Florida's death penalty statute meets constitutional muster. Finally, Petitioner's third argument must fail because death by electrocution does not constitute cruel and unusual punishment. In Re: Kemmler, supra.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to STEPHEN N. BERNSTEIN, 725 N.E. 1st Street, Gainesville, FL 32601, Counsel for Petitioner, by U. S. Mail this 25th day of September, 1981.

GEORGE R. GEORGIEFF
Assistant Attorney General

OF COUNSEL.

NO. 81-5086

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

STEPHEN TODD BOOKER,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

APPENDIX TO

Brief in Opposition to Petition

For Writ of Certiorari

(Thereupon, STEPHEN TODD BOOKER, called as a witness on behalf of the Defense, being first duly sworn, testified as follows:)

DIRECT EXAMINATION

BY MR. BERNSTEIN:

Q Mr. Booker, you have sat at this table with me for the past three days and heard a lot of testimony concerning the events surrounding this charge and the allegations against you. And you have heard the jury's verdict. Do you have a recollection of your own of what happened on November 9th?

A No. I don't.

Q No, you don't?

A No, sir.

Q If you in fact committed the acts since you don't remember as has been found by this jury as has been alleged by the State and charged in this case, do you have any feelings of remorse in regards to these possible acts?

A Yes. If I committed them I would be remorseful.

Q At this time are you denying that you committed the acts alleged?

A I don't remember.

A Yes, eight times.

Q All right. Have you ever been hospitalized for mental difficulties?

A Eight times.

Q When or how old were you when the first occasion transpired when you were hospitalized for mental difficulties?

A I'm not certain, 13 or 14 years old.

Q I am going to ask that you speak a little bit louder so everyone can hear.

Do you recall how old you were on the second occasion that you were hospitalized?

A Fourteen or fifteen, more like fifteen.

Q Can you remember the third time you were hospitalized?

A This was 19.

Q Now these instances that you refer to when you were 13 and 15 and 19, do you recall where you were hospitalized?

A Yes, sir. The first two times I was hospitalized in Kings County G Building in Brooklyn, New York.

Q Were these at a mental facility?

A Yes, sir.

Q Do you remember the fourth time you were hospitalized

A The third time was Camp Codie Medical Center on Okinawa.

Q That was the third time?

PIERSON CO., RAHWAY, N.J. 07065 - FORM 740

Q That was when you were 19?

A Yes, sir.

Q When was the fourth time?

A Still 19 at Camp Codie Medical Center on Okinawa.

Q Okay. And the fifth time?

A Walter Reed Medical Center in Washington, D.C.

Q All right. Now you heard Dr. Carrera testify about papers that dealt with a time when you were committed to Walter Reed in his testimony when you were in the service. Is this the same hospital we are talking about?

A Yes, sir.

Q And that was from June until August of 1973?

A Yes, sir.

Q Do you remember this sixth time that you were hospitalized?

A I don't know the name of the hospital, but it was at Fort Dix Army Post in New Jersey.

Q Do you remember when that was?

A '73 again.

Q Do you remember the seventh time you were hospitalized?

A 1974, Fort Dix, same hospital.

Q And the eighth time that you were hospitalized.

A It must be nine times. I just remember that after

G Building in '74.

Q '74?

A Yes, sir.

Q And the final time you can remember is when?

A Here in Gainesville Alachua General.

Q Do you remember when that was?

A It was in November of last year.

Q Was it shortly after you were arrested?

A Yes, sir.

Q Have you had any difficulties during this time you were hospitalized from the time you were 13 until now with periods of time which you can't remember?

A Yes, sir. Three of these occasions of hospitalization, that was the reason for being in the hospital.

Q That you couldn't remember what had happened to you?

A Yes, sir.

Q There was also evidence presented at the trial that you had problems with alcohol. Have you experienced to your knowledge a problem with alcohol?

A Yes, sir.

Q Is it a chronic problem with alcohol?

A I don't readily admit that it was chronic, but this is what all the doctors and evaluations of me have said.

given the opportunity prior to going to trial to enter a plea of guilty to the charge of murder in the second degree, would you have taken that opportunity?

MR. HEBERT: The State objects. That is irrelevant and immaterial.

THE COURT: The objection is sustained because now what you have gone so far may go to the state of mind as in the second paragraph of mitigating circumstances. This would be immaterial.

MR. BERNSTEIN: Your Honor, I would submit that although this may be outside the spectrum of mitigating circumstances listed in the statute, that it is still material to the question of what the jury will be deciding today and what recommendations they will make. I believe the case law allows -- I believe the case is Province v. State, and I will be glad to cite it for the Court.

THE COURT: I don't allow that which the Court may deem material.

MR. BERNSTEIN: Yes, sir I would admit to the Court I think it's outside the mitigating circumstances listed in the statute, but I think it is still material and relevant to the issue.

MR. HEBERT: Your Honor, there has been no offer

have taken one if it had been offered is irrelevant.

MR. BERNSTEIN: I don't believe it would be irrelevant. I would certainly admit that the State has never offered that.

THE COURT: Well, then we won't go into it.

MR. BERNSTEIN: Yes, sir. Your Honor, that would be all the questions I have of Mr. Booker.

CROSS-EXAMINATION

BY MR. HERBERT:

Q Mr. Booker, you indicated that you were hospitalized when you were about 14 or 15 years old.

A Thirteen or fourteen the first time.

Q Okay. On either of those times, 13, 14, or 15 year of your life when you were hospitalized, was that because of some act you committed or because you volunteered, turned yourself in to somebody?

A No. It was because my mother turned me in.

Q Because you were a problem to the Court or a problem at home?

A I had a little trouble with juvenile courts concerning I was suffering from acute alcoholism.

Q All right. Now, you said that you were hospitalized

A Twice.

Q Excuse me, twice. Is that when you were in the military?

A Yes, sir.

Q When did you go in the military? How old were you?

A Seventeen years old, in December of 1970.

Q How long did you stay in the military?

A Three years and two months.

Q During that period of time how many Article 15's did you have?

A Then 11.

Q How many court-martials did you have?

A One.

Q Your discharge was non-medical; wasn't it?

A Honorable discharge.

Q Not for medical reasons?

A No, sir.

Q Do you consider yourself a violent person?

A Not necessarily, no.

Q Do you have problems with acts of violence while you were in the service?

A Yes. I did.

Q Other than these for fighting, have you ever attempted to kill people?

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A Could be.

Q You know what I am talking about, Mr. Booker?

A Yes.

Q I am talking about houses of prostitution. Did you ever try to kill anybody over there?

A Not necessarily. I used to -- we used to rob cat houses.

Q What weapons did you use to hit people with?

A Claw hammer.

Q How many people do you think you hit with the claw hammer?

A I can't recollect.

Q More than five?

A I would say about five.

Q More than ten?

A No.

Q When you were in these hospitals, did you pay for your treatment there or was that paid by the county or state?

A Which hospital?

Q Any one of them. Did you pay for any of these treatments? Was this paid by the county or state?

A The county hospital I guess was paid for by the

county and Alachua County by the [illegible]

Q In the county hospital or state hospital you didn't pay bills yourself for those sessions did you?

A No. I didn't.

Q Now, you said you had an alcohol problem. Was that here in Alachua County that you had it as well as other places? You had it in other places?

A Yes, sir. I did.

Q Did you go to the Alcothon House here?

A Yes, sir

Q Did you pay for those services during you stay there?

A Some I have. When I was employed I paid.

Q When were you employed?

A During residency there.

Q How long were you in Alcothon?

A I was there probably a month and a half.

Q And how much of the time of that were you employed?

A Week and a half.

Q The rest of the time the county paid for the services; is that true.

A I imagine that's true.

THE COURT: A little louder, Mr. Booker. It is difficult for the court reporter to hear, and I also need to hear.

killed, November 9th, 1977, a Wednesday, do you remember getting up that morning at 7:00 or 7:30?

A Yes. I do.

Q Do you remember getting up feeling like you wanted to kill somebody that day?

MR. BERNSTEIN: Your Honor, I am going to object at this time and ask to approach the Bench.

(Thereupon, counsel and the Court conferred at the sidebar off the record and out of the hearing of the jury and the reporter.)

THE COURT: The ruling of the Court since that goes to the question of lapse of memory on the day of the incident that was opened by the defendant is that the question may be asked.

Q Mr. Booker, my question to you was do you remember when you got up at 7:00 or 7:30 feeling that morning like you wanted to kill somebody?

A Part of the way, yes.

Q Did you know Mrs. Harmon prior to this date?

A No. I didn't.

Q Had she ever done anything to you in her life to deny you anything or prevent you from anything?

A No. In regards to me knowing her, I still don't know her. I have just been confronted with her in this

MR. BERNSTEIN: Your Honor, for the record if I may --

THE COURT: Yes. It was understood that you had a motion that you would make at this time that would be considered the same as if you had made it at the appropriate time.

MR. BERNSTEIN: Thank you, Your Honor. At this time I would move to strike all of the cross-examination on the part of Mr. Hebert I had based on confidential information supplied by psychiatric reports in this case. Specifically I refer to questions that related to activities during the morning of November 9th, 1977 and what actions took place during that morning or what statements may have been made or what thoughts may have been had.

It is my understanding at this time from my information, from my experience, and from my discovery that this information came out during those confidential conversations with the psychiatrist and revealed through those recommendations and opinions filed closed in the sense that the Court ordered them closed and confidential in this particular case which defense counsel and counsel for the State Attorney's Office, of course, had access to.

I think it's improper to use those [illegible] questions in this proceeding and move to strike all those questions and all answers responded thereto, and move for mistrial on the basis of the fact that those questions were stated in front of the jury.

THE COURT: Mr. Hebert.

MR. HEBERT: Your Honor, the information that I asked the defendant he could answer or deny. He could admit it or deny it. And I would have been stuck without the ability to present rebuttal testimony should he deny it. I didn't ask if they were in the psychiatric report or not. I asked of the morning. As a matter of fact, some of the testimony that was used came from Officer Mick Price's interviews of the defendant. not as to how he felt, but what he did that morning excluding the drinking.

Now, the questions when asked of the defendant should he deny that he had such feelings or thoughts or activities, I agree I would have been stuck with his answer. The defendant chose to answer the way he did. I find nothing irregular about that.

MR. BERNSTEIN: My objection is not that the defendant answered truthfully or not truthfully. The question was proffered and I think the subject matter of information came out of the confidential reports.

was the ruling of the Court at the time, and I told you at the sidebar that it would be the ruling of the Court that you opened up the question of what the defendant remembered and how well he did not remember certain things and how well he did remember certain things.

And accordingly it was the judgment and ruling of the Court that the State Attorney that having been opened had a right to inquire as to what he remembered about that date and that only. He could not go any further than that, and he was instructed not to go further than that.

I thank you very much, gentlemen. You have your record. Motion for mistrial is denied. And motion to strike is denied. Court will be in recess.

(Thereupon, the Court took a recess at 3:00 p.m.; whereupon, the following proceedings were had at 4:00 p.m. in the presence of the jury and all Court personnel:)

THE COURT: All necessary parties present and the jury in, ladies and gentlemen of the jury, have you arrived at your advisory sentence?

THE FOREMAN: Yes, sir.

THE COURT: Kindly hand the advisory sentence to the Clerk.

(Thereupon, the advisory sentence was handed to

IN THE COUNTY COURT OF THE EIGHTH JUDICIAL CIRCUIT, IN AND FOR ALACHUA COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

vs.

STEPHEN T. BOOKER,

Defendant.

Case No. 77-2332-CF

FILED
1977 NOV 15 AM 11:05
CLERK CIRCUIT & COUNTY COURT
ALACHUA CO., FLA.

MOTION FOR MENTAL EXAMINATION AND NOTICE OF DEFENSE OF INSANITY

COMES NOW the Defendant, STEPHEN T. BOOKER, by and through his undersigned Attorney, and respectfully moves this Honorable Court pursuant to Section 914.06 of the Florida Statutes to appoint two qualified psychiatrists to examine the Defendant to determine whether he was insane at the time of the alleged offense, and whether the Defendant is presently insane. In support of this motion it is alleged to the Court:

1. That the State is not opposed to this Motion and, in fact, is willing to stipulate to the factual basis for the Motion.

2. That the Defendant has provided statements to Law Enforcement Officials in which he has taken on at least two different personalitites.

3. That the Defendant has seriously attempted to commit suicide while being incarcerated in the Alachua County Adult Detention Center.

4. That pursuant to Section 925.10 (1)(a)(1) of the Florida Statute, (1977), the Defendant meets the criteria for involuntary hospitilization.

5. [illegible] October 17, 1977, in the [illegible] the Honorable A. A. Green, Jr. declared the presentment he insanity defense unconstitutional. This ruling is now ppeal. If the Appellate Court eventually reverses Judge n, the Defendant herein may be prejudiced to the presen- ion of the insanity defense unless an examination is ered at the present time. The passage of time diminishes ability of the examining physicians to determine the endant's sanity or insanity at the time of the commission the alleged offense.

6. That the Defendant was admitted to Alachua General spital under an emergency Baker Act procedure following s attempted suicide and was preliminarily examined by se Llinas, M.D.

Notice is also hereby given that the Defendant may ely upon insanity as a defense in this case in compliance ith Section 914.06 of the Florida Statutes.

Defendant also respectfully asks that he be given ifteen (15) days in which to file a bill of particulars after receipt of the psychiatric evaluation.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the Honorable Eugene T. Whitworth, State Attorney, Post Office Box 1437, Gainesville, Florida, this 15th day of November, 1977.

Respectfully submitted,

C. Richard Parker

for STEPHEN N. BERNSTEIN
Assistant Public Defender
317 N.E. First Street
Gainesville, FL 32601

IN THE SUPREME COURT OF FLORIDA

STEPHEN TODD BOOKER, Appellant, vs. THE STATE OF FLORIDA, Appellee,	ON APPEAL TO THE SUPREME COURT OF FLORIDA. Case No. 55,568

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Defendant in the Court below, STEPHEN TODD BOOKER, will be hereinafter referred to as Appellant. References to the Record on Appeal will be made by use of the symbol "R" followed by the appropriate page number (s) in parentheses. The references to the trial transcript will be made by the use of symbol "T" followed by the appropriate page number (s) in parentheses.

STATEMENT OF THE CASE

The Appellant is STEPHEN TODD BOOKER, a Defendant in a State prosecution for violation of Florida Statute section 782.04, for Murder in the First Degree.

The Appellant was arrested on November 11, 1977 for the charge of Murder. A Motion for Mental Examination and Notice of Defense of Insanity was filed November 15, 1977. A hearing was held on November 22, 1977. On that date, an Order Committing Defendant to Intake Facilities for Competency Evaluations and Appointment of Experts to Examine the Defendant on the Issue of Insanity was entered.

On December 2, 1977, the Grand Jurors of the State of Florida for Alachua County, Florida returned an Indictment for Murder in the First Degree in Count I, Murder in the First Degree, in Count II, Sexual Battery, and in Count III, Burglary. A plea of not guilty was filed in behalf of the Appellant on December 13, 1977.

A Motion for Appointment of Additional Psychiatrist to Examine Defendant was filed February 2, 1978. The hearing on this Motion was held on March 3, 1978 and on that date an order was entered granting said motion.

The trial of the action commenced on June 19, 1978

and continued through June 21, 1978. On June 21, 1978 the returned verdicts of guilty as to Counts I, II, and III. On June 22, 1978 an Advisory Sentencing Proceeding was held after which the jury recommended death as punishment for Count I.

A Motion for New Trial was filed on behalf of the Appellant on June 26, 1978. An Amended Motion for New Trial was filed July 13, 1978. On July 19, 1978 Appellant filed the following: Motions to Exclude the Death Penalty; Memorandum in Support of Motions to Exclude the Death Penalty; further a Motion to Declare Section 922.10 of Florida Statutes Unconstitutional was filed by Appellant on July 25, 1978. On September 15, 1978, the trial Court entered an Order Denying Defendant's Post-Trial Motions.

On October 20, 1978, the Trial Court announced its Judgement and Sentence and sentenced Appellant to Death for Count I, Fifty-five (55) years in prison for Count II, and thirty-five (35) years in prison for Count III.

A Notice of Appeal to this Court was filed on behalf of Appellant on November 17, 1978 along with a Statement of Judicial Acts to be Reviewed on the same date.

ARGUMENT

I. WHETHER THE LOWER COURT'S RULING PERMITTING THE THE PROSECUTOR TO ASK QUESTIONS BASED ON INFORMATION GATHERED FROM COURT ORDERED PSYCHIATRIC REPORTS VIOLATED APPELLANT'S RIGHT AGAINST SELF INCRIMINATION.

A Court Ordered psychiatric examination is generally not considered violative of a Defendant's right to freedom from compelled self incrimination, as embodied in the Fifth Amendment of the United States Constitution and Article I Section 9 of the Florida Constitution. Psychiatrists may render opinions concerning sanity based on factual statements made by the defendant-patient. However, direct testimony concerning facts surrounding a crime, ascertained during a compulsory mental examination is prohibited. Parkin v. State, 230 So.2d 817 (Fla. 1970).

In this case, the Appellant took the witness stand at the Advisory Sentence Proceedings held on June 22, 1978. During cross-examination, counsel for the Appellant objected to questions based on information within confidential psychiatric reports prepared by court appointed experts. (R.880).

The first objectionable area involved statements by the Appellant concerning previous acts of violence while in Okinawa in the armed forces. In a psychiatric report based on interviews with the appellant, Dr. George Barnard

(R-898) reported that the Appellant was

"asked if he had any experience in real life where he had shown violence to others, and he replied that he had, while in the Army. He said that while in Okinawa he would go into towns and take a claw hammer with him; he would then tiptoe into a whorehouse and beat anyone he could find."

In a supplemental report filed by Dr. Barnard the same information was noted:

"He was asked if he ever killed anyone else and he said no, but he had hit people with a hammer and never found out what had happened to them. He thought he may have hit a dozen people in this manner on different occasions. This occurred in whorehouses while he was in Okinawa."

(R-901)

Dr. Frank Carrera also interviewed the Appellant pursuant to court order and stated in his report:

"Mr. Booker denied he had ever killed anyone before. While stationed in Okinawa he said he used to go to whorehouses armed with a hammer and beat people with the hammer. He thought he mighve have don(e) this a dozen times."

(R-908)

It is clear that the prosecutor was referring to this confidential matter in the following exchange:

Q. "Did you have problems with acts of violence while you were in the service?"

A. "Yes, I did."

Q. "Other than these for fighting, have you ever attempted to kill people?" (T-590, R-841).

A. "No."

Q. "While you were in Okinawa in the houses?"

A. "Could be."

Q. "You know what I'm talking about, Mr. Booker?"

A. "Yes."

Q. "I'm talking about houses of prostitution. Did you ever try to kill anybody over there?"

A. "Not necessarily. I used to - we used to rob cat houses."

Q. "What weapons did you use to hit people with?"

A. "Claw hammers." (T-591, R-842).

The second area of contention concerns statements about the morning of November 9, 1977. Dr. Barnard's report states: "On the day of the alleged crime he awoke about seven or seven thirty in the morning, and on that morning he specifically went to the houses of two different people in order to kill someone, but at each house decided against the act." (R-900). Dr. Carrera's report quotes: " . . . I was mad that day . . . I got up at 7:00 or 7:30 . . . I wanted to kill somebody that morning . . . " (R-907).

Again, the prosecutor's cross examination of the Appellant followed the psychiatric report:

Q. "Mr. Booker, my question to you was to you remember when you got up at 7:00 or 7:30 feeling that morning like you wanted to kill somebody?"

A. "Part of the way, yes." (R-844, T-593)

Q. "Did you attempt to kill anyone else that day; do you remember that?"

A. "Sure, I remember."

Q. "Do you remember you did?"

A. "No I didn't try to kill anybody that day."

Q. "In the morning?"

A. "Right."

Q. "You did not?"

A. "No, I didn't."

Q. "Did you think about doing it?"

A. "Sometimes I did, but I gave up the idea because it was crazy." (T-594, R-845).

Finally, concerning the actual stabbing itself, Dr. Barnard's reports states: "He said he did not remember leaving but his next memory was that of standing over an old lady as she was lying in bed. He said he had his hand over her mouth and that he stabbed her in the

heart with a paring knife, but she did not stop breathing."

(R-897).

Dr. Carrera's report includes the statement: "He next remembered being in a house, standing over an old woman . . . she was on a bed, saying nothing. He next remembered 'stabbing her with a knife . . .'".

(R-904).

Again, on cross examination, the following question and answer occurred:

Q. "Do you remember standing over Mrs. Harmon, this lady, with a knife in your hand and stabbing her?"

A. "No, I do not." (T.-597, R-848).

It is settled law in Florida that a Defendant relying on an insanity defense must cooperate with the court-appointed experts or be precluded from offering the testimony of his privately engaged expert on the matter. Parkin v. State, supra. However, the Parkin Court was careful to point out that even where the insanity defense was invoked there must be carefully constitutional limitations on the testimony of such court-appointed experts.

"There is a differentiation of the issue of insanity from that of guilt-in-fact. The insanity plea and the guilty plea raise separate issues on which different kinds of evidence may be introduced. As a general rule, if evidence is admissible on

one issue and inadmissible on another, the Court may allow the evidence to come in. However, the trial judges does not possess discretion in excluding evidence admissible on one issue if its probative value on that issue is insufficient to outweigh its prejudicial effect on other issues. McCormick, Evidence § 59 (1954); Adkins v. Brett, 184 Cal. 252, 193 P. 251 (1920). The Court should prohibit the psychiatrist from testifying directly as to the facts surrounding the crime, where such facts have been elicited from the Defendant during the course of a compulsory mental examination.

"In other words, the Court and the State should not in their inquiry go beyond eliciting the opinion of the expert as to sanity or insanity, and should not inquire as to information concerning the alleged offense provided by a Defendant during his interview; however, if the Defendant's Counsel opens the inquiry to collateral issues, admissions or guilt, the State's redirect examination properly could inquire within the scope opened by the defense."

Id. at p. 820.

The questions posed by the prosecutor in the case at bar were not addressed to the issue of sanity. These questions were specifically directed towards factual admission made by the appellant during court-ordered psychiatric examinations.

The testimony of the appellant during direct examination began with the statement that he did not have any recollection of the events that occurred on November 9, 1977. The Appellant stated that although he did not remember committing the acts charged against him, if he did commit those acts, he was remorseful about them. (T-584, R-835). The remaining direct examination dealt solely with the several times he was hospitalized for

mental difficulties (T-585, T-587, R-836, R-838). The Appellant submits that this direct examination in no way opened the door for the prosecutor to inquire about specific information prejudicial to Appellant when such inquiries were based on information gained from confidential reports of court-ordered psychiatric examinations.

In Parkin, supra., the Court further states "The Constitution does not shield against incrimination by voluntary statements, even if given in pursuit of a collateral issue such as insanity; it does, however, shield against the unfair use of such statements." It was blatantly "unfair" of the prosecutor to use statements from confidential psychiatric reports for the following reasons:

1. There was not even a pretense made to use them for purposes of the determination of sanity or insanity.

2. There was no way the content of the information could be verified or refuted, this was especially harmful because the Appellant had exhibited clear evidence of psychosis.

3. The type of information elicited did not fall within the statutory enumerated aggravating circumstances, and,

4. The cross examination did not explore areas opened up by defense Counsel on direct examination.

This area of question has been commented on in the federal courts. In the case of Collins v. Auger, 428 F. Supp. (S.D. Iowa 1977) the Defendant under criminal charge had been committed to a hospital for mental treatment. During the trial, a treating physician was examined as to statements made during treatment. In discussing the concept of fundamental fairness the Court stated:

> In this Court's opinion, it is fundamentally unfair to use Defendant's incriminating admissions to a psychiatrist during a psychiatric examination as part of the prosecutor's case to prove his guilt . . . The fundamental unfairness of the introduction of such evidence violates Defendant's right to due process under the Fourteenth Amendment to the Constitution of the United States. Id. at p. 1082.

The Court said this unfair practice was analogous to using a Defendant's testimony at a pre-trial suppression hearing in a trial to determine guilt, a procedure rejcted by the United States Supreme Court in Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L.Ed. 2d 1247 (1968).

The Collins opinion further noted:

> Congress solved this problem for Federal Courts in psychiatric examinations to determine a Defendant's mental capacity to stand trial by providing:
>
> "No statement made by the accused in the course of any examination into his sanity or mental competency provided for in this section, whether the examination shall be with or without the consent of the

accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

18 U.SC. § 4244

The Object of the privilege against self-incrimination is to (I)insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but is is as broad as the mischief against which it seeks to guard.'

Counsel v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198 35 L.ED. 1110 (1892). See also Maness v. Myers, 419 U.S. 449, 461 95 S.Ct. 584, 42 L.Ed. 2nd 574 (1975)."

Id. at p. 1083.

In McMunn v. State, 264 So.2d 868 (Fla. 1st DCA 1972) the First District Court of Appeal expressed further concern about the privilege against self-incrimination, relying on the rationale set out in Parkin, supra. The McMunn Court labelled as objectionable the question to the Defendant "whether or not at that time and that place you told Dr. Nelson the details of what happened that night including firing the shot?", Id at 2, p. 869 as well as later impeachment testimony through the person of Dr. Nelson, the examining psychiatrist. This holding was a logical extension of the Parkin rationale to prohibit the unfair use of statements made during court-ordered psychiatric examinations in cross examination of a Defendant as well as impeachment testimony by the examining expert.

The reasoning of McMunn was blended with that of

Parkin in this Court's decision in Jones v. State, 289 So.2d 725 (Fla. 1974). There, the State maintained that before an expert could testify as to insanity, the Defendant would first have to lay the predicate for such expert opinion by testifying as to those underlying statements he discussed with that examining expert. The Jones Court held that such an exclusionary rule would improperly require a Defendant to abridge his constitutional right against self incrimination.

It was stated in the Parkin decision, and quoted with approval in the McMunn and Jones cases, that if any statements obtained from the patient by the doctor are used as evidence, they are used as evidence of mental condition only, and not as evidence of the factual truth which may be contained in them. (Parkin v. State, supra. at 822.) The thrust of the prosecutor's questions of the Appellant in the case at bar was clearly not directed toward evidence of mental condition.

The prosecutor agreed on the record that if the Appellant had denied any of the questions put to him by the prosecutor, no rebuttal evidence would have been available. (R-p.881). The lack of rebuttal or corroborative sustenance seriously detracts from any probative value of the information elicited. Therefore, objections to the prosecutor's questions based on confidential

information should have been sustained. Failure to do so was reversible error as any probative value of the information is completely outweighed by the prejudice to the Appellant. The purpose of evidentiary rules is to assure reliability of information considered by the factfinders. The only way that information used by the prosecutor on cross examination could be verified was by use of confidential psychiatric reports which is prohibited. There was no possibility of corroboration independant of the appellant.

II. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF UNAUTHORIZED AGGRAVATING FACTORS DURING THE ADVISORY SENTENCING PROCEEDING.

During the Advisory Sentence Proceeding the prosecutor crossexamined the Appellant as to alleged previous acts of violence occurring several years prior to the murder case. (T-590-591; R-841-842). There was never any verification of these previous acts questioned by evidence of a previous conviction for such an offense as required by Florida Statute Section 921.141 (5) (b) (1975).

This Court dealt with this very issue in Elledge v. State, 346 So.2d 998 (Fla. 1977) where Justice Sundberg, for the majority opinion, stated:

"Admission of evidence of the Gaffney Murder is proscribed by our decision in Provence, supra, because the charge had not resulted in a conviction at the time of the trial of the instant case. It was therefore, a non statutory aggravating factor. But was the error harmless because of the lack of objection and the existence of substantial additional aggravating circumstances? We believe not."

Id at 1002.

The concern in Elledge was about the introduction of evidence of a confession of another murder when there had been no previous conviction for the same. In the case at bar, we have the introduction of testimony of unconfirmed prior violent activity with no prior conviction of any other form of verification. The Appellant asserts that there was an unauthorized aggravating factor which entered into the consideration of the judge and jury and very probably "tipped the scale of the weighing process in favor of death."

The prosecutor further cross examined the Appellant as to feelings of "wanting to kill someone" or "thoughts of killing other people" than the decedent on the date of the offense. (T-593-594; R-844-845). This evidence, although indicating feelings or thoughts of other violence cannot be substantiated by a conviction under law previous to trial.

The Elledge opinion further noted that there must exist some mitigating circumstances for there to be the

danger of taint from unauthorized aggravating factors. Id. at 1003. The Court noted that although the trial judge's written findings expressly negated the existence of certain mitigating circumstances, his sentencing order concluded that death as punishment was warranted after "weighing the aggravating and mitigating circumstances," thus implying he found some mitigating circumstances. Similarly, in the case at bar, although the trial judge does not state any finding of mitigating circumstances, his judgement states the following:

"Accordingly, the Court further finds that there are insufficient mitigating circumstances to outweigh the aggravating circumstances which are sufficient to require the pronouncement of sentence hereinafter made." (T-p.147).

As in the Elledge case, it cannot be determined whether the result of the weighing process by both the jury and the judge would have been different had the impermissible aggravating factor not been present.

"Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered." Id. at 1003.

III. WHETHER FLORIDA STATUTE §921.141, AS PROCEDURAL IN NATURE VIOLATES THE CONSTITUTIONAL REQUIREMENTS OF ARTICLE V SECTION 2 (a) OF THE CONSTITUTION OF THE STATE OF FLORIDA.

The Florida Supreme Court rule making power is contained in Art. V., § 2 (a), Fla. Const., which provides:

"The Supreme Court shall adopt rules for the practice and procedure in all courts including the time for seeking Appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jursidiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds of the membership of each house of the legislature."

This provision has been interpreted by the Florida Supreme Court to mean that the legislature "has no constitutional authority to enact any law relating to the practice and procedure." In Re Clarification of Florida Rules of Practice and Procedure, 281 So.2d 204 (1973). Furthermore, if the legislature enacts such a law, the Court has declared that "until and unless the Supreme Court of Florida adopts such statute as its own . . . the purported enactment is void". State v. Smith, 260 So.2d 489, 491 (Fla. 1972). As Section 921.141 does not affect or alter the substantive rights of the accused, it is a procedural statute. However, Section 921.141 has not been promulgated or adopted as a rule of procedure by the Florida Supreme Court. Therefore, following the Supreme Court's constitutional interpretation of Article V, S 2, Florida Statute Section 921.141 is void.

The Supreme Court of Florida recently stated:

"The legislature has the constitutional right to repeal any rule of the Supreme Court by a two-thirds vote, but it has no constitutional authority to enact any law relating to practice

and procedure. See State v. Smith and Figgers, 260 So.2d 489 (Fla., 1972). The distinction between practice and procedure, which is regulated by the Supreme Court and substantive law which is regulated by the Legislature, is discussed in a concurring opinion, In Re: Florida Rules of Criminal Procedure, 272, So.2d 65 (Fla., 1972)." (Emphasis supplied.) In Re Clarification of Florida Rules of Practice and Procedure (Florida Constitution, Article V, Section 2(a)), 281 So.2d 204 (Fla., 1973) hereinafter referred to as "Clarification".

Such a result is not only dictated by the separation of powers doctrine; as a practical matter, it is necessary in order that conflicts may be avoided. In Re Florida Rules of Criminal Procedure, 196 So.2d 124 (Fla. 1967).

In order to determine the scope of judicial rule making, the procedural or substantive character of the area in question must be defined. Then, the nature and extent of the legislative role in regulating procedures must be ascertained. See Note, the Rule Making Power of the Florida Supreme Court; the Twilight Zone Between Substance and Procedure, 24 U Fla. L Rev. 87 (1971) at 91. In an effort to determine the scope of judicial rule making encompassed by the term "practice and procedure", Appellant has examined the Supreme Court's per curiam order In Re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972) and the concurring opinion of Justice Atkins. (It is this opinion to which the entire Court made specific reference in Clarification, supra.)

After rather exhaustive citation to foreign law, Justice Atkins proposed the following definition of the term "practice and procedure" as it applies to the Court's rule making power":

"Practice and procedure encompass the course, form, manner, means, method, mode, order, process, or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the produce thereon." Id at 66.

Defendant respectfully requests that this Court apply the above definition to the following abbreviated text containing relevant language from the death penalty state:

"921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Upon conviction or adjudication of guil of a defendant of a capital felony the court shall conduct a separate sentencing proceeding . . . The proceeding shall be conducted by the trial judge . . . If the trial jury has been waived or if the Defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury . . . In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence . . .

(2) After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist . . .
(b) Whether sufficient mitigating circumstances exist . . .
(c) Based on these considerations whether the Defendant should be sentenced to life or death.

(3) Notwithstanding the recommendation of a majority of the

jury, the court . . . shall enter a sentence of life imprisonment or death . . . it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist . . .
(b) That tere are insufficient mitigating circumstances . . .
In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and based upon the records of the trial and the sentencing proceedings.

(4) If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment . . .

(5) The judgement of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Supreme Court.

(6) Aggravating circumstances. - - - Aggravating circumstances shall be limited to the following:

(7) Mitigating circumstances. - - - Mitigating circumstances shall be the following:

(emphasis supplied.)

Appellant submits that in the Florida Statute cited supra, the Florida Legislature has strayed from the enactment of substantive law which " . . . creates, defines, adopts, and regulates rights . . ., i.e., the rights of life, liberty, property, and reputation . . ." (emphasis supplied.), and has entered the domain of practice and procedure.

The Florida Legislature has spelled out, in the most

minute detail, exactly how a sentencing proceeding is to be conducted. Both judge and jury are told what factors they are to consider and the procedure they are to follow in reaching a final judgement. The Legislature has gone so far as to direct this Court as to when it "shall" review a judgement and sentence of death. (Section 921.141 (5), F.S. The sixty day time limit which the Legislature has established conflicts with F.A.R. 6.2. Other quoted statutory language, supra, is filled with additional mandatory provisions directing the bench and jury as to how they "shall" implement all of the procedural provisions contained therein.

In Hay v. Isetts, 98 Fla. 1026, 125 So. 237, 240 (1939) the Supreme Court held that certain Florida Statutes which attempted to determine who were to be parties to an appeal would not " . . . be held to alter the conclusions stated in this opinion." Justice Brown stated in a concurring opinion:

> "The Courts have too long and too frequently acquiesced in legislation which really encroached upon strictly judicial power, and thus transfress the fundamental constitutional principles providing for the separation of the powers of government into three great departments, the legislative, the executive, and the judicial, each independant of, and constituting a check upon, the power of the others, so as to preserve the highest usefulness and independence of each, within their respective constitutional confines, and guard against abuse of power by either of them." Id. at 243.

State v. Garcia, 229 So.2d 236 (Fla., 1969), raised the issue of whether a defendant indicated for a capital offense could waive a jury trial. The pertinent statute prohibited waiver where a sentence of death could be imposed. The conflicting judicial rule, authorizing jury trial waiver, did not limit the right in capital cases. Finding that the rule's allowance of jury waiver did not abrogate or modify substantive law, the Garcia Court deemed the rule to be within the Court's rule making powers. Consequently, the statute was deemed to have been voided since it conflicted with a "procedural rule".

Finally, in State v. Dixon, 283 So.2d 1(1973), the Supreme Court decided, sua sponte, under its rule making power, that the Legislature's requirement that a trial court support its sentence of death with a written statement of findings (§921.141 (3), F.S.) was too narrow a procedural "safeguard":

"We also considered it reasonable to require that a finding that life imprisonment be imposed rather than death should be supported in writing by the trial judge. This we do require under our constitutional power to regulate practice and procedure in the courts. Fla. Const., Art. V., § 2 (a), F.S.A." (emphasis supplied.) Supra at 8.

In State v. Lee, 286 So.2d 596 (Fla. 1st D.C.A. 1973) Rudolph Valentine Lee was convicted of murder and sentenced

to death prior to the United States Supreme Court's decision in Furman v. Georgia, 408 US 238 (1972). After Furman, Lee ved the trial Court to set aside his death sentence. The Court granted the motion and resentenced him to life imprisonment. The State appealed to the First District Court of Appeals. While this appeal was pending, the Florida Legislature enacted section 921.141. On appeal, the First District held that Defendant Lee could be resentenced under Section 921.141 without offending ex post facto principles:

"Section 921.141 . . . does not create a new and substantive crime. Nor does it provide a new or higher penalty for first degree muder than was provided when the offense or trial herein occurred. All the new statutory provision does is to attempt to provide for a manner in which the death penalty may be imposed in appropriate cases in a way that does not collied with the constitution."

The Florida Supreme Court modified the Court of Appeal's decision. Lee v. State, 294 So.2d 305 (Fla. 1974) held that the provision of section 921.141 requiring the defendant to serve a mandatory 25 years in prison when sentenced to life imprisonement upon conviction for a capital felony was substantive and could not be applied retroactively. Furthermore, it was not possible to sentence Lee, as his original jury had long since been discharged and section 921.141 contained no provision authorizing the trial judge to empanel a new jury on the penalty issue. The Court

overcame the problem, however, by simply authorizing the trial court to empanel a second jury, stating:

> Since the question raised is one of the procedure to be used for the imposition of sentence, it si properly within the constitutional authority for determination by this court . . . Id at 308.

The Court thus held that section 921.141 was procedural because defendant Lee could be resentenced under it for a homocide committed beofre the statute was enacted. Further, it explicitly recognized the procedural nature of the statute by adding a provision to it under its constitutional rulemaking authority.

The Lee case is particularly persuasive as to the procedural nature of section 921.141, because it involved a judicial characterization of the term "procedural" that affected the substantive rights of a party. While the court might not be bound by indirect references in section 921.141 as procedural, or by definitions stated as general propositions without reference to a particular issue, the expectation of consistency is considerably more forceful where the Court has, as here, used the procedural characterization to expose a defendant to a second possibility of a death sentence. The characterization must have been a carefully considered one. Once made, the court should be consistent.

Similarly, in Dobbert v. Florida, 97 S. Ct. 2290

(1977) the United States Supreme Court characterized the Florida statutory changes in §921.141 as procedural and found no ex post facto violation. Dobbert committed his alleged murders prior to the Furman decision. He was brought to trial under the new death penalty procedure and sentenced to death. On certiorari, Dobbert argued that the statutory reallocation of sentencing authority from the jury to the trial judge affectuated after his crime was an ex post facto violation. The U. S. Supreme Court rejected the argument, stating:

> In the case at hand, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime, Id at 2298.

The Florida Supreme Court has not adopted section 921.141 as a rule of procedure. The last order of the Court adopting procedural statutes as rules of criminal procedure was entered on December 6, 1972, when the Court promulgated amendments to the criminal rules effective February 1, 1973. In Re Florida Rules of Criminal Procedure, 272, So.2d 65 (Fla. 1972). Section 921.141 was not signed into law until December 8, 1972, and therefore was not adopted by this order.

The Florida Supreme Courts Order of December 6, 1972 specifically stated that "statutes not superseded shall

remain in effect as rules promulgated by the Supreme Court." (Emphasis supplied.) Its language thus contemplates the validity only of statute in effect at the time of the order.

In 1977 the Florida Supreme Court promulgated rule 3.780 as follows:

"Sentencing Hearing for Capital Cases

Rule 3.780. Sentencing Hearing for Capital Cases.

(a) In all proceedings based upon Section 921.141, Florida Statutes (1975), the state and defendant will be permitted to present evidence of an aggravating or mitigating nature, consistent with the requirements of the statute. Each side will be permitted to cross examine the witnesses presented by the other side. The State will present evidence first.

(b) The trial judge shall permit rebuttal testimony.

(c) Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The State will present argument first.

While this rule mentions or refers to Florida Statute Section 921.141, it does not specifically adopt that statute. The Florida Supreme Court does not adopt rules of procedure out of hand by mere mention, but rather must "breathe life into a legislative Act" by specific adoption as required by Article V, Section 2(a) of the Constitution of the State of Florida. State v. Smith, supra.

Furthermore, the Court itself has thought it necessary to expressly adopt a procedural statute enacted

after December 6, 1972, in order to give it a legal effect, although the rule promulgated was copied almost verbatim from the statute. The 1976 Legislature amended FLA. STATUTE §903, 132 (1976 Supp) to repeal Florida Rules of Criminal Procedure 3.691, in so far as it made bail on appeal from a conviction discreationary in all cases and specified a bail on appeal must be denied. These statutory provisions were adopted verbatim by the 1977 Amendments to Rule 3.691. In Re Florida Rules of Criminal Procedure, 343 So.2d 1247, 1262 (Fla. 1977).

While the Court in State v. Dixon, supra, upheld the constitutionality of Florida Statute §921.141, there again was no adoption of the statute. The Dixon Court did not address an Article V § 2 (a) challenge and its discussion of the due process and cruel and unususal punishment issues furnishes no support for an implied adoption of the statute.

The scanty outline of procedure of Rule 3.780 fails to pass muster as required by the constitutions mandate of responsibility. This being the case, the Florida Death Penalty scheme is invalid because it is not the produce of the particular deliverative process described by Article V.

IV. WHETHER FLORIDA STATUTE SECTION 921.141 PROVIDES SUFFICIENT CONSTITUTIONAL STANDARDS OF RELIABILITY IN FACT FINDING TO JUSTIFY THE IMPOSITION OF DEATH AS PUNISHMENT.

The United States Supreme Court in the case of Lockett v. Ohio, 23 Cr. L. 3215 (July 3, 1978) reversed the proceedings of the Ohio Court systems to the extent that they sustained the imposition of the death penalty in that case. The Court struck down the Ohio death penalty statute and the four Justice plurality concluded that the statute was too narrowly confined in the range of mitigating circumstances which the sentencing authority could consider. This same plurality, Justice Stewart, Powell, and Stephens, had contribued the lead opinion in many of the death penalty cases since Gregg V. Georgia, 428 US. 153 (1976), and was joined in this case by the Chief Justice Berger, who authored the plurality's opinion. Chief Justice Berger reviewed the Court's previous capital punishment decisions noting that "the signals from this Court have not . . . always been easy to decipher," and in the case that he had decided to put aside his "previously differing views" and attempt to unite a majority behind a clear rationale which the States could follow.

The Chief Justice wrote . . ."the penalty of death

is qualitatively different from any other sentence. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed" Id at 3220.

Mr. Justice Marshall in his concurring opinion states "Permitting imposition of the death penalty solely on proof of felony - murder, moreover, necessarily leads to the kind of 'lighting bolt, freakish, and wanton' executions that persuaded other Members of the Court to join Mr. Justice Brennen and myself in Furman v. Georgia, 408 U.S. 238 (1972), in holding Georgia's death penalty statute unconstitutional. Whether a death results in the course of a felony (thus giving rise to felony - murder liability) turns on fortuitous events do not distinguish intention or moral culpability of the defendants."

Mr. Justice White in his concurring opinion takes this one step further in stating " . . . that it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.

It is now established that a penalty constitutes cruel and unusual punishment if it is excessive in

in relation to the crime for which it is imposed."

The Justices in their opinions appear to indicate that the reliability in the process is mandatory before death is appropriate as a penalty. They further indicate that the reliability in the process is mandatory before death is appropriate as a penalty. The further indications are that there is a distinction to be made between intentional premeditated murders and those that involved proof of a felony - murder situation and therefore, there is a need to have a factual distinction or finding made to determine which situation exists prior to the imposition of any death sentence for any killing.

Florida Statute 921.141 which provides the procedure by which mitigating and aggravating circumstances are to be considered by the jury in making a recommendation as to whether death is an appropriate penalty does not provide for any such fact findings to be made on the part of the jury.

The only guidance offered come from the Florida Standard Jury Instruction at Page 79:

"Aggravating Circumstances must be established beyond a reasonable doubt before they may be considered by you."

This requirement is echoed in this Court's decision in Dixon v. State, 283 So.2d 1 (Fla. 1973). However, there is no provisions for any specification as to which standard

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for evaluation of what degree some circumstances may outweigh one another.

It is inherent in the requirement that a jury is employed in this procedure that such evaluations should be more than a mere numerical addition of aggravating and mitigating circumstances. Nevertheless, Florida Statute Section 921.141 offers no guidance to a jury charged with rendering an advisory opinion. The advisory jury is not even required to state that they found as fact finders that the aggravating circumstances outweigh the mitigating circumstances by whatever standard they applied when advising the imposition of death as punishment.

Absent such findings of fact there is not a sufficient degree of reliability provided for a sentence which would be in proportion to the qualitative difference that exists between death and other penalties under the law.

V. WHETHER FLORIDA STATUTE SECTION 922.10 IS UNCONSTITUTIONAL IN THAT IT PROVIDES PUNISHMENT WHICH IS CRUEL AND UNUSUAL.

SPINKELLINK

The Appellant was convicted of Murder in the First Degree under Section 782.04 (1)(a) Florida Statute (1975), a Capital felony requiring the imposition of a sentence of life imprisonment or death, Section 775.082, Florida

Statute (1975). The sentencing procedure was governed by Section 921.141 Florida Statutes (1975) and death was the sentence imposed by the lower court. This sentence is mandated to be carried out by means of electrocution pursuant to Section 922.10 Florida Statutes (1975). The Appellant here asserts that death by electrocution is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and also in violation of Article I, Sections 9 and 17 of the Florida Constitution.

The Supreme Court in Gregg v. Georgia, 96 S.Ct. 2909, at 2925, (1976), stated the following:

"A penalty . . . must accord with the 'the dignity of man', which is the basic concept underlining the Eighth Amendment. Trop v. Dulles, 356 U.S. at 100, 78 S.Ct. at 597 (Plurality Opinion). This means at least, that the punishment not be 'excessive'. When a form of punishment in the abstract . . . rather than in the particular . . . is under consideration, the inquiry into 'excessiveness' has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Furman v. Georgia, 408 U.S. at 392, 393 92 S.Ct. at 2805 - 2806 . . . Second, the punishment must not be grossly and out of proportion to the severity of the crime."

The Gregg Court went on to say that although the legislature cannot be required to select the least severe penalty possible it shall be required to select a penalty which is not cruelly inhumane or disproportionent to the crime involved. The American Draftsmen who adopted the phrasing in the Eighth Amendment to the United States

Constitution were primarily concerned with proscribing "Tortures and other barbarous methods of punishment".

However, the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Gregg v. Georgia, supra.

Death by electrocution involves the unnecessary and wanton infliction of pain and does not meet the evolving standards of decency which mark the progress of our maturing society. There exists today means of execution which do not require the infliction of such needless pain and suffering. One example of a more humane means is that of lethal injection. Now specifically prescribed by several of the states in our union and also urged for consideration by our present Attorney General.

VI. WHETHER OR NOT THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE A PHOTOGRAPH OF THE DECEASED WHICH WAS OF A HIGHLY PREJUDICIAL AND INFLAMMATORY NATURE, TO-WIT: APPELLEE'S EXHIBIT # 16.

During the course of the trial, the State introduced into evidence photographs of the victim as she was found at the scene of the crime. Appellant asserts that introduction of one of these photographs, Appellee's Exhibit # 16, had such incalculable, prejudicial, and inflammatory effect so as to require a reversal of the conviction and

a new trial in this cause.

The relevant issue before the trial court was whether not the Appellant had committed First Degree Murder upon victim. A photograph showing the position of the victim the manner in which she was found had already been ered into evidence as State's exhibit # 15 without ection from Defense Counsel. (R-496-498). The State t further than this, however, and offered into evidence ruesome photograph of the victim. This photograph, which eventually entered into evidence over Appellant's objec- n as States exhibit # 16, was similar to State's exhibit 5, however, a cloth had been removed to reveal a knife truding through the victim's throat.

Although the prejudicial effect which a photograph have does not render it admissible, it must nevertheless independantly relevant. In the case of Dyken v. State, So.2d 866 (Fla. 1956) this Court held:

" . . . competent and material evidence should not be excluded ely because it may have a tendency to influence or prejudice jury beyond a strict limit for the purpose for which it is issible. (citations omitted) . . . This argument, however, supposes that the photograph was independantly relevant."

Appellee's Exhibit # 16 was not independently relevant prove any fact in issue. The identity of the victim never in question in this case and the State prove the tim's identity with other evidence. The fact of death

r the cause of death were never questioned by Appellant
d Defense Counsel stated in his objection to the photo-
aph that he did not believe the cause of death would be
issue in the trial. (R-498). The cause of death was
oven through the deposition of the pathologist entered
to evidence. (R-556). The pathologist expressed her
inion that the cause of death was from injuries sus-
ined prior to the knife wound to the throat which was
explicitly and graphically depicted by State's Exhi-
t # 16. (R-566-568). The photograph was also not
elevant on the question of premeditation. The condi-
ion of the victim and the multiplicity of the wounds
ere indicative of a frenzied, psychotic attack by the
urderer, as maintained by defense counsel, rather than
premeditated design to accomplish murder as alleged
y the State.

Appellant would cite to the Court the case of
eddish v. State, 167 So.2d 858 (Fla. 1964). In
eddish, a First Degree Murder case, photographs were
dmitted into evidence depicting the victims as they
y in the morgue. The Court found errror in the admis-
on of this evidence and stated:

"We have consistantly held that photographs which have potential for unduly influencing a jury should be admitted only if they have some relevancy to the facts in issue . . . while the photographs (in the instant case) were not unusually gruesome, when measured by the standards of others which have been allowed into evidence, we nevertheless fail to find any justifiably relevancy for their admissibility in the instant case. The cause of death had been clearly established and there was no fact or circumstance in issue which necessitated or justified the introduction of the photographs of the dead bodies. (citations omitted), at 863.

The Reddish Court found that the fact that the bodies had been removed to the morgue in and of itself made out an argument for the lack of relevancy. While State's Exhibit # 16, in the case before this Court, was taken at the locus of the crime, it was nevertheless irrevelant to any and all of the facts in issue.

The State's arguments for introducing Exhibit # 16 at the time of trial were two-fold. First, the State contended that the photograph was a depiction of the murder weapon. Of course, Counsel for the State could have introduced the weapon itself into evidence rather that the photograph of it. Second, the State contended that the jury had a right to see the wounds and the manner in which they were inflicted to help them make the determination of pre-meditation. It should be noted that the wounds so accurately depicted were not the cause of death according to the uncontroverted testimony of the pathologist. (R.566-568). Further, Appellant contends

as stated above, the photograph went more to show a frenzied, psychotic state on the part of the murderer than the pre-meditated design as alleged by the State.

In conclusion, Appellant asserts that the inflammatory photograph which was entered into evidence by the State was entered under a pretext of relevancy in order to inflame the minds of the jurors. This would be in direct contradiction of the edict of Justice England's concurrence in Funchess v. State, 341 So.2d 762, at 765 (Fla. 1977),

> " . . . that prosecutors in this state should be more circumspect in their endeavors and should remove from the Courtroom of the State to the fullest extent possible, the elements of passion and emotion."

VII. WHETHER OR NOT THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE CARDS CONTAINING LATENT FINGERPRINTS WHERE THE INVESTIGATOR WHO LIFTED THE FINGERPRINTS TESTIFIED THAT THE CARDS INTRODUCED WERE NOT IN THE SAME CONDITION AS WHEN THE FINGERPRINTS WERE LIFTED.

During the course of the trial, Investigator Terry of the Gainesville Police Department testified that he had lifted latent fingerprints from the scene of the crime. Upon questioning from the State Attorney, Investigator Terry stated that the fingerprint cards which were shown to him were not in the same condition as when he lifted them. (R-533). The fingerprint cards were later admitted into evidence, over Appellant's objection, during the testimony

of State's fingerprint expert, George Johnson. Johnson testified to having made markings on the cards. While these markings might account for a specific change to the cards, they do not explain the changes which Investigator Terry saw on the cards. This is so because Investigator Terry never established what changes he saw on the cards. (R-533). While Investigator Terry might have been referring solely to the identifying marks on the cards by State's expert Johnson, this fact was never established. There are any number of misidentifications, alterations, and misunderstandings about these cards which may have accidently occurred during a transfer between Investigator Terry and fingerprint witness, George Johnson.

Where tangible evidence is introduced against an accused and two or more State's witnesses testify about this tangible evidence, the burden is on the State to show that its witnesses are testifying as to the same evidence. Longshaw v. State, 343 So.2d 1290 (Fla. 3rd DCA 1977).

VIII. WHETHER OR NOT THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR REDUCTION OF CHARGE IN RELATION TO COUNT II OF THE INDICTMENT WHERE THERE HAD ONLY BEEN CIRCUMSTANTIAL EVIDENCE TO SUPPORT THE ELEMENTS OF THE CHARGE, AND THE STATE'S PROOF DID NOT MEETS ITS ALLEGATIONS.

In Count II of the Indictment, relating to Unlawful Sexual Battery, the State made the allegation that the Sexual Battery was committed with

" . . . actual physical force likely to cause serious personal injury."

(R-11).

Having made this allegation, the State was bound to make proof of this fact as required by Florida Law.

In the case of Long v. State, 99 So.2d 259 (Fla. 1957), this Court stated:

"The general rule is where an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the Indictment. At 260."

In the case of Lewis v. State, 53 So.2d 707 (Fla. 1951), this Court held:

"No principle of criminal law is better settled than that the State must prove the allegations set out in the Information or the Indictment. At 708."

In short, Appellant submits to the Court that the probata must prove the allegata beyond every reasonable doubt. Florida Law demands that the State having charged the use of actual physical force likely to cause serious personal injury was bound to prove said force beyond all said reasonable doubt.

The evidence used to prove Count II against the Appellant was solely circumstantial. It is well settled in Florida Law that when circumstantial evidence is relied

upon for a conviction it must be inconsistent with all reasonable hypotheses of innocence. Parrish et al v. State, 124 So. 444 (Fla. 1929); Nash v. State, 188 So.2d 391 (Fla. 3rd DCA 1966); Lockett v. State, 262 So.2d 253 (Fla. 4th DCA 1972).

Appellant contends that a reasonable hypotheses of innocence exists in the question of whether or not actual physical force likely to cause bodily injury was used in the commission of the Sexual Battery as alleged in Count II of the Indictment. The testimony of the pathologist was that the Sexual Battery occurred before death. (R-577). The Sexual Battery having occurred before death, it is reasonable to infer that the rape occurred before the physical force was used against the victim. The evidence established that the Appellant was far superior in strength, stature, and size to the victim. He was a young man of 23 years of age while she was a frail woman of 94 and it is reasonable to conclude from the circumstances that no physical force or threat would have been necessary for him to complete the act of Sexual Battery. While it is reasonable to infer that actual physical force likely to cause serious bodily injury was used in the commission of the Sexual Battery, it is equally as reasonable upon the evidence to infer a contrary position.

Appellant contends that the State was bound to prove that actual physical force likely to cause serious bodily injury was used in the commission of the Sexual Battery. The State attempted to make this proof through the use of circumstantial evidence. The circumstantial evidence did not exclude all reasonable hypotheses of innocence and therefore the conviction sustained upon Count II of the Indictment should have been permitted only as to a reduced charge.

IX. WHETHER OR NOT THE TRIAL COURT ERRED IN ALLOWING CONVICTION ON COUNT III OF THE INDICTMENT CHARGING BURGLARY OF A DWELLING WITH INTENT TO COMMIT LARCENY WHERE THERE WAS ONLY CIRCUMSTANTIAL EVIDENCE TO PROVE THE CHARGE AND A REASONABLE HYPOTHESES FOR A LACK OF INTENT TO COMMIT LARCENY EXISTED.

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Appellant contends that the conviction of Count III charging Burglary with Intent to Commit Larceny is in contradiction to the Law of Circumstantial Evidence.

Where the State alleges Burglary with Intent to Commit a crime, the intent to commit that crime must be proved. Rumph v. State, 248 So.2d 256 (Fla. 1st DCA 1971); Griffin v. State, 276 So.2d 842 (Fla. 4th DCA 1973). The State's attempt to prove the intent to commit larceny was based upon circumstantial evidence. In the main, the State based its case on two circumstantial proofs; First, the State made proof that the Defendant's fingerprints were found at the scene of the crime; Second, the crime scene

area was found in a disorganized state and appeared to have been ransacked.

Appellant contends that the proofs presented by the State are insufficient on the question on intent to commit Larceny as a matter of law. Circumstantail evidence can support a conviction only where the circumstances presented are consistent with guilt and inconsistent with any reasonable hypotheses of innocence. There was evidence adduced at trial which was inconsistent with the State's theory of intent to commit larceny. There was no showing that any property was taken from the victim's home although the perpetuator of the crime would have had ample opportunity to take the victim's property. In fact, cash in the amount of $370.00 was found in the victim's home by police officers who arrived at the scene. (T-273-274, R-520-521).

There being evidence inconsistent with the State's theory, there are any number of reasonable theories of innocence to be afforded Appellant. There may have been an intent to disturb or disrupt the premises rather than an attempt to steal. The acts themselves may have been pointless carrying no intent at all. Defense Counsel maintained throughout the proceedings in this case that the crimes charged were the result of a psychotic episode

rather than a premeditated criminal design. The evidence, or rather the lack of evidence, was consistent with the theory of psychotic rage with no specific intent.

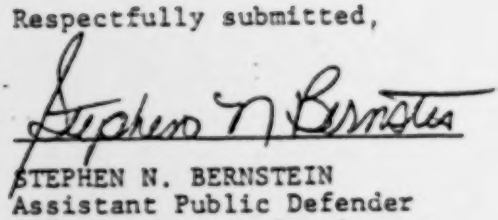
As to Count III, all roads to not lead to Rome. The circumstances are not such that they exclude any and all reasonable hypotheses of innocence. The evidence adduced at trial gives rise to a reasonable conclusion inconsistent with the State's theory of guilt, and it goes beyond the law of circumstantial evidence in Florida to allow a conviction to stand on Count III of the Indictment.

CONCLUSION

Based upon the foregoing recitation of the record, and the authorities cited in the above arguments, Appellant respectfully submits that the trial court committed reversible error by admitting into evidence inflammatory photographs of the deceased, to wit: Appellee's Exhibit # 16; by admitting into evidence latent fingerprint cards which were somehow in an altered condition; by denying Appellant's Motions for Reduction of Sexual Battery charge and for Judgement of Acquittal as to the Burglary charge; by permitting the Prosecutor to ask questions based on confidentail psychiatric reports and to pursue area of aggravating factors not specified by statute. The Appellant further asserts that Florida Statute § 921.141 is unconstitutional as a statute dealing with procedure and as providing insufficient standards of reliability. The Appellant also asserts that Florida Statute § 922.10 is unconstitutional in that it provides for cruel and unusual punishment.

For the reasons stated herein, the Appellant prays that this Honorable Court enter an order vacating the judgements and sentences, order a new trial proceeding and grant such other relief as may see just and proper.

Respectfully submitted,



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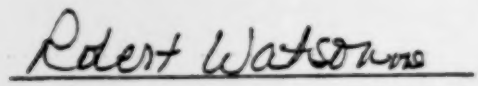
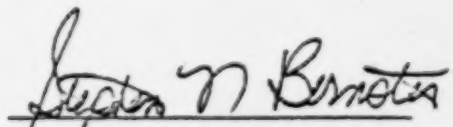


ROBERT WATSON
Student Intern

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the Honorable Jim Smith, Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32304, and to the Appellant, STEPHEN TODD BOOKER, this 14th day of March, 1979.



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IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

RECEIVED
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DEPT. OF LEGAL AFFAIRS
CRIMINAL DIVISION

82-5468

STEPHEN TODD BOOKER,

Petitioner-Appellant,

-v-

LOUIE L. WAINWRIGHT, Secretary
Florida Department of Corrections,

Respondent-Appellee.

Received
10-25-82
Florida Attorney General

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court
For the Northern District of Florida
Tallahassee Division

PREFERENCE FOR PROCESSING:
APPEAL FROM THE FEDERAL DISTRICT COURT'S
DENIAL OF PETITION FOR HABEAS CORPUS

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I. ON CROSS-EXAMINATION OF THE APPELLANT DURING THE PENALTY PHASE WHERE AGGRAVATING CIRCUMSTANCES WERE CRITICAL ISSUES, THE PROSECUTOR'S USE OF INFORMATION DERIVED FROM A COURT-ORDERED MENTAL COMPETENCY EXAMINATION CONTRAVENED THE DICTATES OF ESTELLE v. SMITH REQUIRING THE APPELLANT'S DEATH SENTENCE TO BE SET ASIDE.

A. THE SYKES-ENGLE DOCTRINE DOES NOT PRECLUDE REVIEW OF THIS ISSUE.

To prevent this Court from ruling on the merits of MR. BOOKER's Estelle argument, Appellee contends that Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, ___ U.S. ___, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), precludes consideration of this issue because it was neither raised at trial nor on direct appeal. (Brief of Appellee at p.14). While it is true that this issue was not presented to the state courts, Appellee is in error in believing that this default prevented review in the federal courts. As developed in the argument that follows, Appellant demonstrated "cause" for his procedural default and "prejudice" from the Constitutional error sought to be reviewed. Thus, Sykes-Engle does not preclude review before this Court.

In its recent procedural default cases, the United States Supreme Court has held that a federal habeas corpus petitioner's failure to comply with state procedural rules cannot bar federal habeas corpus relief so long as the petitioner makes "a showing of 'cause' for [his] failure [to abide by the state procedural rule and] a showing of actual prejudice." Francis v. Henderson, 425 U.S. 536, 542 (1976). Accord Sykes, supra, 433 U.S. at 91, Engle, 102 S.Ct. at 1562. While the Supreme Court has left the

lower federal courts to determine "the precise content" of the terms "cause" and "actual prejudice", id., the various opinions in Sykes and in related cases stongly suggest the contours of those terms.

Thus, there is "cause" if a petitioner can supply some "plausible explanation" or "excuse" for defaulting procedurally under state rules other than that he or his counsel made an unwise tactical or strategic decision. See, e.g., Sykes, supra, at 89 n.13,91 and n.14; id., at 96 (Stevens, J., concurring); id., at 99 (White, J., concurring). Moreover, "actual prejudice" exists if the error underlying petitioner's federal claim was not "harmless beyond a reasonable doubt" under the standards set forth in Chapman v. California, 386 U.S. 18 (1967) and Harrington v. California, 395 U.S. 250 (1969).

With respect to the particular issue discussed here, both "cause" and "actual prejudice" are unquestionably present under these standards as explained and interpreted by the lower federal courts. As to "cause", Appellant's alleged procedural default is amply excused because of substantial changes in the law concerning death penalty cases since his trial. Because of these changes in the law governing death penalty cases, the claim now being raised by Appellant is now clearly available, but at the time of Appellant's trial and direct appeal, it was not available at all. Appellant's trial counsel could not have been aware that the Fifth Amendment privilege was applicable to psychiatric examinations, since Florida law did not recognize the privilege outside the

realm of police interrogation at the time of Appellant's trial (June 19-22, 1978). See In re Beverly, 342 So. 2d 481, 488 (Fla. 1977); Holston v. State, 208 So. 2d 98, 100 (Fla. 1968). Moreover, the United States Supreme Court did not render its decision in Estelle v. Smith, 451 U.S. 454 (1981) until May 8, 1981, nearly three years after Appellant's trial had taken place. And lastly, Appellant's case was decided by the Supreme Court of Florida on March 19, 1981 (Brief of Appellee at 27, n.5), two full months before the Estelle case was decided.

Thus, Appellant's "cause" for his procedural default falls directly within the exception left open by the Court in Engle, supra, regarding constitutional objections "unknown at the time of trial". Id. 102 S.Ct. at 1573. [Emphasis added]. Justice O'Connor, in her opinion in Engle, "hesitated to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim." Id. at 1573. Therefore, assuming that Appellee would hesitate to require clairvoyance on the part of Appellant's trial counsel, Appellee's Sykes-Engle argument is clearly inapplicable and without merit. This is further supported by the "actual prejudice" to Appellant's case caused by the trial court's admission of testimony regarding Appellant's prior criminal conduct which would have been inadmissable under Estelle v. Smith, supra. Clearly this damaging testimony prejudiced Appellant during the sentencing phase of the trial, resulting in the jury's recommendation of death as punishment.

B. ESTELLE v. SMITH IS APPLICABLE TO SITUATIONS IN WHICH A DEFENDANT REQUESTS A PSYCHIATRIC EXAMINATION FOR THE PURPOSE OF PROVING INSANITY.

The Estelle v. Smith holding is a logical progression of the procedural safeguards required by the Miranda decision. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981). Those Miranda safeguards are designed to protect the accused from "the compulsion to incriminate himself arising from an official custodial interrogation." Id. at 698. During the psychiatric interview which constitutes a custodial interrogation, the court appointed psychiatrist, is an agent of the state as is a police officer or prosecuting attorney. Estelle v. Smith, 451 U.S. at 467-68; Battie, 655 F.2d at 698-99. "It makes no difference whether the motion for examination was initiated by the defense or prosecutor." Battie, 655 F.2d at 702 [emphasis added], although in the instant case the State Attorney desired the mental examination be performed. Thus it can be seen that the fact that Appellant requested the psychiatric examination is insufficient to distinguish Estelle from the case sub judice.

Equally insufficient is Appellee's contention that Estelle does not apply because the examination was "analogous to a sanity examination occasion by a defendant's plea of not guilty by reason of insanity", Estelle, at 451 U.S. 465. Appellee completely misinterprets the meaning of the Court's language therein. For if the State had used the results of that examination to address the issue of Appellant's sanity, then clearly Appellee's argument would have merit and Estelle would be inapplicable. However,

where as in Estelle and the case at bar "the results of the [psychiatric examination] were used by the state for a much broader objective that was plainly adverse to respondent", Estelle at 451 U.S. 465, the Fifth Amendment's protections must apply. In Estelle, the prosecutor used information to elicit evidence of his "future dangerousness". Id. In the instant case, information derived from defendant's "sanity" examination was used to show Appellant's prior criminal conduct, although this would have been an improper aggravating circumstance. Clearly these situations are analogous, and therefore require like treatment under the law.

C. APPELLANT DID NOT WAIVE HIS FIFTH AMENDMENT PRIVILEGE UNDER ESTELLE v. SMITH.

Although those cases interpreting Estelle v. Smith involved the admissibility of the psychiatrist's testimony, rather than the defendant's own testimony on the stand, the rationale behind the Fifth Amendment protection supports the extension of Estelle v. Smith to the facts in the case at bar. Appellant's Memorandum of Law in Support of his Application for Stay of Execution clearly demonstrates that the prosecutor, on cross examination, used MR. BOOKER's statements obtained during Appellant's court-ordered psychiatric examination. (See pgs. 19-21). It is irrelevant that the information was elicited at the penalty phase through MR. BOOKER, himself, rather than the psychiatrist.

"[A] defendant must be free to take the stand ... without fear that his testimony will permit the prosecution to introduce

evidence illegally obtained from him and thus unavailable in the government's case-in-chief ..." United States v. Curry, 358 F.2d 904, 910 (2d Cir. 1966). Admittedly, there are those situations where the government may use illegally obtained evidence to challenge the defendant's credibility should he resort to perjured testimony on the stand. Walden v. United States, 347 U.S. 62 (1954); United States v. Curry, 358 F.2d at 910-11. However, the instant case is not one of those situations involving perjury. Rather, one federal court recognized, "[t]he situation is analogous to the attempt to use defendant's testimony at a suppression hearing in a trial to determine guilt." Collins v. Auger, 428 F. Supp. 1079, 1083 (S.D. Iowa, 1977). Indeed a defendant's testimony at a motion to suppress hearing is inadmissible at trial on the issue of guilt, Simmons v. United States, 390 U.S. 377 (1968), similar to an accused's statements during an examination to determine sanity or mental competency which is inadmissible on the issue of guilt in any criminal proceeding. 18 U.S.C. §4244 (1976). Since the Supreme Court makes no distinction for Fifth Amendment considerations between the guilt and the penalty phases in capital cases, Brief for Appellant at pages 2-3, the Collins court analogy is apposite in the case at bar.

At the penalty phase, the Appellant was compelled to sacrifice his Fifth Amendment Constitutional right to claim another -- the right to testify at his own trial. This represents an "intolerable" situation. Simmons, 390 U.S. at 394, accord, Collins, 428 F. Supp. at 1083. The Miranda court recognized that the Fifth Amendment.

which declares "[n]o person ... shall be compelled in any criminal case to be a witness against himself", goes "to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the federal Constitution in prosecuting individuals for crime." 389 U.S. at 439. Indeed the rationale articulated by the Supreme Court in support of suppressing statements violative of Miranda is directly applicable to MR. BOOKER's cross examination:

> "To maintain a 'fair state-individual balance', to require the government 'to shoulder the entire load', to respect the inviolability of the human personalty', our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will'." 390 U.S. at 460 (Citations omitted) (Emphasis added).

The trial court erroneously permitted the prosecutor to utilize the substantive disclosures from the court appointed psychiatric reports obtained in violation of Appellant's constitutional rights. In addition to the self-incrimination issue, substantial equal protection implications arise. If the Appellant, rather than being an indigent, could have afforded a private psychiatric examination, the physician/patient relationship may have prevented the prosecutor's discovery of petitioner's statements during the exam. See, Collins, 428 F. Supp. at 1084. That privileged relationship is not accorded an indigent defendant and his court appointed physician. Id. Thus, the prosecutor's line of inquiry on petitioner during the penalty phase violated the doctrines of Estelle v. Smith and Miranda v. Arizona, mandating

that the Appellant's death sentence be vacated.

II. THE EXECUTION OF APPELLANT WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENT REQUIREMENTS OF INDIVIDUALIZED SENTENCING WHERE THE TRIAL COURT LIMITED CONSIDERATION OF RELEVANT MITIGATING FACTORS.

A. THE SYKES-ENGLE DOCTRINE DOES NOT PRECLUDE REVIEW OF THIS ISSUE, BECAUSE APPELLANT HAS DEMONSTRATED CAUSE AND ACTUAL PREJUDICE.

Appellant's procedural default with regard to this particular issue is excused because the trial judge's rulings in this case demonstrate that he believed that consideration of mitigating factors was limited only to those set out in the statute. As a result, valid mitigating factors were not considered by either judge or jury. Thus careful review of the record reveals that the Sykes exception does apply in this case.

In restricting the consideration of mitigating factors to the statute, the trial judge "followed the law as he believed it was being interpreted at the time of trial", Perry v. State, 395 So. 2d 170, 174 (Fla. 1981). As the Florida Supreme Court recognized in Perry, there were misconceptions caused by the decision in Cooper v. State, 336 So. 2d 1133 (Fla. 1976) which, from a plain reading, limited consideration of mitigating circumstances to only those in the statute. ID. at 174. Refusing to admit Appellant's proferred mitigating testimony regarding prior employment, the Cooper court ruled that "the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty ..., and we are not

free to expand the list." Cooper at 1139, and n.7 [Emphasis added].

The Cooper decision was not reinterpreted and clarified by the Florida Supreme Court until Songer v. State, 365 So. 2d 696 (Fla. 1978) (opinion on rehearing). However the Songer reinterpretation was not announced until three months after the trial of the instant case. Consequently, the trial judge's instructions to the jury during the sentencing phase were proper under the position of the Florida courts at the time of trial, and therefore no complaint can be made of Appellant's failure to object contemporaneously to these jury instructions.

Appellee's contention that the United States Supreme Court opinion on Proffitt v. Florida, 428 U.S. 242 (1976) should have put Appellant on notice as to the "true" state of the law in Florida makes no sense. Proffitt indicated that there appeared to be no intent in the statute to limit the mitigating circumstances to those listed in the statute. Proffitt at 250, n.8. What Appellee has overlooked is that shortly after Proffitt was decided, the Florida Supreme Court explicitly declared that the Florida death penalty statute restricted the consideration of mitigating circumstances to those circumstances listed in the statute. Cooper, supra at 1139, and n.7.

Thus, to the extent that any principle related to the scope of mitigating circumstances available for consideration was apparent at the time of Appellant's trial, the principle appeared to be that the list of circumstances set forth in the statute was exclusive. Accordingly, Appellant has established "cause" to excuse his procedural default.

This showing of "cause" is in harmony with the Supreme Court's consistently expressed concern, rooted in comity and equity, that litigants not deliberately forego state remedies for constitutional deprivations or turn such remedies into sham proceedings. Beginning in 1963 with the landmark decision in Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court has developed an increasingly stronger policy to deter litigants from bypassing state criminal and postconviction remedies in order to get their federal constitutional claims into federal court. However, the central theme of this policy, which has remained constant since 1963, is the following:

> "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be characterized as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits--..."

Id., at 439. Thus, the policy basis extending from Fay v. Noia through Wainwright v. Sykes is identical: to foreclose federal habeas review to the litigant who, in light of the known and reasonably knowable principles of law and the known facts, chooses not to assert a claim or a right at the opportunity for asserting that claim or right. See, Wainwright v. Sykes, 433 U.S. 72, 98-99 (1977) (White, J., concurring); Estelle v. Williams, 425 U.S. 501, 515 (1976) (Powell, J., concurring). In light of this principle, the litigant who failed to assert a claim properly in state proceedings, not because of intelligent choice, but because the claim

was not known to exist, actually or arguably, at the time it had to be raised, should not be held to have defaulted so as to bar later assertion of the claim when the claim reasonably -- given new, unanticipated developments in the law -- arises. Such an exception to the rule of default described above has been explicitly adopted in O'Conner v. Ohio, 385 U.S. 92 (1966):

> "[defendant's] failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by the Court." Id. at 93.

Thus, Appellant submits that his "cause" explanation for his procedural default must be found.

In addition to demonstrating cause for his procedural default, Appellant has also demonstrated "actual prejudice" from the constitutional error for which he seeks review. Cause and prejudice are sometimes interrelated. See, Huffman v. Wainwright, 651 F.2d 347 (5th Cir. 1981). The error asserted here "so inflicted the entire [sentencing proceeding] that the resulting [sentence] violate[d] due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973). See also, Washington v. Watkins, 655 F.2d 1346, 1376-77 (S. Cir. 1981). Such a showing of prejudice suffices to establish "actual prejudice" under Sykes. See, Tyler v. Phelps, 643 F.2d 1095, 1100 (5th Cir. 1981).

For these reasons, therefore, the District Court improperly applied Sykes to preclude review of this issue. Thus, there is no barrier to this Court reaching the merits of the issue argued by Appellant.

B. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY DURING THE SENTENCING PHASE WITH RESPECT TO MITIGATING CIRCUMSTANCES LIMITED THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES.

Appellee argues that Appellant's counsel introduced some evidence of nonstatutory mitigating factors, and adverted to those factors in his closing argument. (Brief of Appellee at 30). Appellee's argument, however, completely misses the point of the Supreme Court's holding in Lockett v. Ohio, 438 U.S. 586 (1978). Sandra Lockett also introduced evidence of nonstatutory mitigating factors, and also argued their relevance to the sentencer. The fatal flaw in Lockett, as in the case sub judice, was not the exclusion of evidence relating to nonstatutory mitigating factors, but the limitation on the sentencer's consideration of that evidence except as it related to the statutory mitigating factors. Washington v. Watkins, 655 F.2d at 1375. [Emphasis added].

Accordingly, just as the Court of Appeals found in Washington v. Watkins, supra, the court's charge to the jury in the present case unconstitutionally limited the jury's consideration of mitigating factors in violation of Lockett v. Ohio, supra. See also, Spiney v. Zant, 661 F.2d 464, 471 (5th Cir. 1981). As a result, Appellant's death penalty must be vacated.

III. BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF THE APPELLANT'S PRIOR ACTS OF VIOLENCE, WITHOUT THE REQUIRED INDICIA OF RELIABILITY OF PRIOR CONVICTIONS, THE TRIAL COURT PERMITTED THE JURY TO CONSIDER A NON-STATUTORY AGGRAVATING CIRCUMSTANCE.

Appellee contends that this admission of evidence of non-

statutory aggravating circumstances was permissable for two reasons. First, Appellee claims that although admitted, this evidence was not considered by the jury, who were instructed that they were limited in their consideration of aggravating circumstances to those spcifically listed in the statute. (Brief of Appellee at 35). Second, Appellee argues that "the questions which had been posed to Appellant during cross-examination had been used to negate a mitigating circumstance, i.e., that defendant had a significant history of prior criminal activity. Id.

As to Appellee's first contention, Appellant submits that the analysis in Henry v. Wainwright, 661 F.2d 56, 58-59 (5th Cir. 1981) requires a death sentence to be set aside under these circumstances. Despite the court's instruction to the jury at Appellant's trial to consider only the statutory aggravating circumstances, Appellant submits that the mere exposure of the jury to this inadmissable evidence, which was nonetheless allowed into evidence over the objection of counsel, "open[ed] too wide a door for the influence of arbitrary factors on the sentencing determination." Henry v. Wainwright, supra, 661 F.2d at 59. As the Tennessee Supreme Court has noted, in deciding that the admission of evidence of nonstatutory aggravating circumstances is itself violative of the Eighth Amendment:

> "[a]ny evidence that does not go to the proof of one or the other of those issues (statutory aggravating or mitigating circumstances) is irrelevant to the jury's deliberation. We cannot believe that the Legislature intended that irrelevant evidence be placed before the jury, fraught as such a procedure would be with the 'substantial risk that (the death penalty) would be inflicted in an arbitrary or capricious manner,' Greg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976)..."

Cozzolino v. State, 584 S.W. 2d 765, 768 (Tenn. 1979). Because it is just as difficult "to discern whether the improper nonstatutory aggravating factors exerted a decisive influence on the sentence determination," Henry v. Wainwright, supra, 661 F.2d at 59, under the circumstances of the Appellant's case -- where the jury was exposed to evidence of nonstatutory aggravating factors but later instructed to consider only statutory aggravating factors -- as it was under the circumstances of Mr. Henry's case, Henry should control, and MR. BOOKER's death sentence should be set aside.

With regard to Appellee's second contention, this evidence was not properly elicited in order to relent the statutory mitigating circumstance of "no significant history of prior criminal activity", Fla. Stat. §921.141(6)(a). By the time this evidence was elicited, the state had already introduced evidence of Appellant's prior conviction for armed robbery as its only evidence in its case-in-chief at the penalty phase. Cf. Booker v. State, 397 So. 2d at 918. Clearly this alleged rebuttal of the mitigating circumstances had already been accomplished. Thus the state succeeded, through the charade of rebutting a statutory circumstance that had already been rebutted, in admitting testimony of nonstatutory aggravating circumstances which it could not have lawfully presented otherwise. Consequently, the exposure of the jury to evidence of nonstatutory aggravating circumstances requires this Court, under the dictates of Henry v. Wainwright, supra, to set aside Appellant's death sentence.

IV. THE SUPREME COURT OF FLORIDA'S SYSTEMATIC EX PARTE SOLICITATION AND COLLECTION OF PSYCHIATRIC, PSYCHOLOGICAL, AND CORRECTIONAL REPORTS CONCERNING THE APPELLANT AND OTHER DEATH SENTENCED APPELLANTS DURING THE PENDENCY OF THEIR CAPITAL APPEALS VIOLATED THE APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. A RATIONAL APPELLATE REVIEW PROCESS IS ONE OF THE TWO FUNDAMENTAL REQUIREMENTS OF CAPITAL SENTENCING PROCEDURES.

Appellee seeks to avoid the dictates of Gardner v. Florida, 430 U.S. 249 (1977) by distinguishing appellate review of death sentence from their imposition. As Judge Kravitch articulated in her dissent in Ford v. Strickland, 676 F.2d at 450, a holding that Gardner is inapplicable to nonrecord information encountered at the appellate level:

> "Must proceed from one or both of the following premises: that rational appellate review is not an essential component of capital sentencing procedures under the Eighth Amendment, or that use of non-record information without notice to the defendant will not undermine the reliability of appellate review in the same way Gardner recognized it would affect the reliability of initial sentencing." 676 F.2d at 454 (Kravitch, J., dissenting).

The first premise is clearly erroneous -- "a rational appellate review process is one of the two fundamental requirements of capital sentencing procedures established by the Supreme Court's 1976 death penalty decisions." Id. (Citing Woodson v. North Carolina, 428 U.S. at 303, 305 (plurality opinion); Roberts v. Louisiana, 428 U.S. at 335 and n.11. (Plurality opinion)). Moreover, the Supreme Court "approved the Florida appellate review procedure on the premise that 'the Florida court has undertaken responsibility to perform its function of death

sentence review with a maximum of rationality and consistence.'" Brown v. Wainwright, 100 S.Ct. at 543, 70 L.Ed.2d at 408 (1981) (Marshall, J., dissenting) (citing Proffitt v. Florida, 428 U.S. at 258-59, (opinion of Stewart, J.)). The second premise is also erroneous. Ford v. Strickland, 676 F.2d at 454 (Kravitch, J., dissenting). "Gardner suggested no relevant distinction between the trial court's initial imposition of a sentence and an appellate court's discharge of its mandatory review function" such a distinction being "irreconcilable" with Proffitt's premise -- rationale and consistent review. Brown v. Wainwright, 100 S.Ct. at 543, 70 L.Ed.2d at 408 (Marshall, J., dissenting). Nor is such a distinction logically suggested.

> "[T]he risk that an appellate court's reliance on non-record information, without providing notice to the defendant of the substance of that information or an opportunity to contest its accuracy, will result in the affirmance of a sentence on the basis of erroneous or misinterpreted information presents as grave a threat of the arbitrary imposition of death condemned in Furman as the risk involved when such a procedure is engaged in by the initial sentencer." Ford v. Strickland, 676 F.2d at 454 (Kravitch, J., dissenting).

Further, exposure to "ex parte, unreliable, nonrecord information", "contested by the adversary process", may distort the Supreme Court of Florida's appellate function, rendering review for proportionality meaningless. Brown v. Wainwright, 100 S.Ct. at 544, 70 L.Ed.2d at 408 (Marshall, J., dissenting).

The Supreme Court of Florida's attempt to avoid the dictates of Gardner by insisting "that fact finding is foreign to its appellate review function and that any nonrecord information received was therefore superfluous" must also fail. Ford v.

Strickland, 676 F.2d at 454-55 (Kravitch, J., dissenting). Florida's attempt to deemphasize the evidentiary review aspect of its appellate review function (Brown v. Wainwright, 302 So. 2d at 1331-33) is belied by Proffitt v. Florida, wherein the Supreme Court upheld Florida's appellate review system because the risk that the death penalty will not be imposed in an arbitrary and capricious manner was minimized because "evidence of aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted'." 428 U.S. at 253 (citing Songer v. State, 322 So. 2d 481, 484 (1975), and Sullivan v. State, 303 So. 2d 632, 637 (1974)). See also Ford v. Strickland, 676 F.2d at 455 (Kravitch, J., dissenting).

Moreover, as noted by Justice Marshall, "[i]f the court does not use the disputed nonrecord information in performing its appellate function, why has it systematically sought the information?" Brown v. Wainwright, 100 S.Ct. at 454, 70 L.Ed.2d at 408 (Marshall, J., dissenting). In fact, the Supreme Court of Florida has admitted that it does use the "'tainted' information ... to deal with newly-articulated procedural standards." Brown v. Wainwright, 392 So. 2d at 1333, n.17. This mysterious use of nonrecord information and the mysterious purpose for requesting it all "underscore the need for a complete factual record." Ford v. Strickland, 676 F.2d at 455 (Kravitch, J., dissengint). As recognized by Justice Marshall:

"[P]etitioners are not asking permission to examine the thought processes of appellate judges, or to obtain disclosure of each item of judicially noticeable nonrecord information considered on appeal. They are asking permission to examine and dispute the accuracy or completeness of nonrecord information submitted to the court pertaining to that individual appellant." Brown v. Wainwright, 100 S.Ct. at 544, 70 L.Ed.2d at 409 (Marshall, J., dissenting).

B. APPELLANT SHOULD BE GRANTED RELIEF BECAUSE HIS CASE WAS PENDING IN THE SUPREME COURT OF FLORIDA DURING THE TIME THE PRACTICE OF THE COURT DESCRIBED ABOVE WAS ON-GOING.

Appellant, STEPHEN TODD BOOKER's original appeal was pending in the Supreme Court of Florida from November 17, 1978 (the date the Notice of Appeal was filed) until March 28, 1981 (the date the Petition for Rehearing was denied). Appellant's case was pending in the Supreme Court of Florida during the time the practice of the Court described above was on-going. Consequently, Appellant should be granted relief on the merits of this issue.

Accordingly, Appellant respectfully prays this Court vacate the death sentence imposed in this case and remand it to the Supreme Court of Florida with appropriate directions.

CONCLUSION

For all the foregoing reasons, this Court should reverse the Order below denying Appellant's habeas corpus petition and should grant habeas corpus relief vacating the unconstitutional conviction and the death sentence imposed upon him or at the the very least allow him the opportunity to complete discovery

requested below so that all matters could be completely litigated.

Respectfully submitted,

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BY: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to LAWRENCE A. KADEN, Assistant Attorney General, Suite 1502, The Capitol, Tallahassee, Florida 32301 by U.S. Mail this 23rd day of October, 1982.

STEPHEN N. BERNSTEIN

8-26-82
Crim CtRP.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

82-5468

STEPHEN TODD BOOKER,

Petitioner-Appellant,

-v-

LOUIE L. WAINWRIGHT, Secretary
Florida Department of Corrections,

Respondent-Appellee.

Docketed
8-26-82
Florida Attorney

APPELLANT'S INITIAL BRIEF

Appeal from the United States District Court
For the Northern District of Florida
Tallahassee Division

PREFERENCE FOR PROCESSING:
APPEAL FROM THE FEDERAL DISTRICT COURT'S
DENIAL OF PETITION FOR HABEAS CORPUS

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STATEMENT REGARDING PREFERENCE

The Appellant is entitled to preference for processing as an appeal from the Federal District Court's denial of his Petition for Habeas Corpus under Rule 22f-3.

ORAL ARGUMENT REQUESTED

The Appellant requests permission of this Court to make an oral argument in this cause. This Brief contains issues which have resulted in a divided decision in another case, see, Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982), in this Court and these issues are presently pending before this Court en banc.

STATEMENT OF THE ISSUES

I. ON CROSS-EXAMINATION OF THE APPELLANT DURING THE PENALTY PHASE WHERE AGGRAVATING CIRCUMSTANCES WERE CRITICAL ISSUES, THE PROSECUTOR'S USE OF INFORMATION DERIVED FROM A COURT-ORDERED MENTAL COMPETENCY EXAMINATION CONTRAVENED THE DICTATES OF ESTELLE v. SMITH REQUIRING THE APPELLANT'S DEATH SENTENCE TO BE SET ASIDE.

A. BECAUSE APPELLANT WAS NOT APPRISED OF HIS FIFTH AMENDMENT PRIVILEGE PRIOR TO THE COURT-ORDERED PSYCHIATRIC EXAMINATION, INFORMATION OBTAINED THEREIN COULD NOT BE USED AS EVIDENCE TO PERSUADE THE JURY TO RETURN A DEATH SENTENCE ACCORDING TO ESTELLE v. SMITH.

B. SINCE APPELLANT'S CONSTITUTIONAL PRIVILEGE WAS VIOLATED, THE PROSECUTION WAS ERRONEOUSLY PERMITTED TO ELICIT INADMISSIBLE EVIDENCE THROUGH THE DEFENDANT'S OWN TESTIMONY, ESTELLE v. SMITH.

II. THE EXECUTION OF THE APPELLANT WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENT REQUIREMENTS OF INDIVIDUALIZED SENTENCING WHERE THE TRIAL COURT LIMITED CONSIDERATION OF RELEVANT MITIGATING FACTORS.

A. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY DURING THE SENTENCING PHASE WITH RESPECT TO MITIGATING CIRCUMSTANCES LIMITED THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES IN VIOLATION OF APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

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III. BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF THE APPELLANT'S PRIOR ACTS OF VIOLENCE, WITHOUT THE REQUIRED INDICIA OF RELIABILITY OF PRIOR CONVICTIONS, THE TRIAL COURT PERMITTED THE JURY TO CONSIDER A NON-STATUTORY AGGRAVATING CIRCUMSTANCE.

IV. THE SUPREME COURT OF FLORIDA'S SYSTEMATIC EX PARTE SOLICITATION AND COLLECTION OF PSYCHIATRIC, PSYCHOLOGICAL, AND CORRECTIONAL REPORTS CONCERNING THE APPELLANT AND OTHER DEATH SENTENCED APPELLANTS DURING THE PENDENCY OF THEIR CAPITAL APPEALS VIOLATED THE APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

STATEMENT OF THE CASE

The Appellant is STEPHEN TODD BOOKER, a defendant in a State prosecution for violation of Florida State Statute §782.04, for Murder in the First Degree. The Appellant was arrested on November 11, 1977 for this charge and a motion for mental examination and notice of defense of insanity was filed on November 15, 1977. This was heard on November 22, 1977 and an order committing defendant to intake facilities for competency evaluations and appointment of experts to examine the defendant on the issue of insanity was issued.

On December 2, 1977 the Grand Jurors of the State of Florida for Alachua County, Florida returned an indictment for Murder in the First Degree in Count I, Sexual Battery in Count II and Burglary in Count III. A plea of Not Guilty was filed in behalf of the Appellant on December 13, 1977.

A motion for an appointment of an additional psychiatrist who examined the defendant was filed on February 2, 1978 with a hearing being held on March 3, 1978 and an order granting the same being entered.

The trial commenced on June 19, 1978 and continued through June 21, 1978 resulting in the verdicts of Guilty as to Counts I, II, and III. On June 22, 1978 an advisory sentence proceeding was held after which the jury recommended death as punishment for Count I.

A motion for new trial was filed on behalf of the Appellant on June 26, 1978 which was amended on July 13, 1978. The Appellant further filed on July 19, 1978, the following: Motions to exclude the death penalty; memorandum in support of motions to exclude the death penalty; a motion to declare §922.10 of Florida Statutes unconstitutional was further filed on July 25, 1978. On September 15, 1978 the trial court entered an order denying the Defendant's post-trial motions. On October 20, 1978 the trial court announced its judgment and sentence, sentencing the Appellant to death for Count I.

An appeal was taken to the Florida Supreme Court which affirmed the judgment and sentence on March 19, 1981 in Booker v. State, 397 So. 2d 910 (Fla. 1981) [McDonald, J., dissenting]. Rehearing was denied.

On September 29, 1980 the Appellant along with 122 other death sentenced appellants, filed an application for extraordinary relief and petitioned for writs of habeas corpus in the Supreme Court of Florida. The Supreme Court of Florida issued its opinion on January 15, 1981 denying relief as to all petitioners, including the Appellant. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for writ of certiorari to the United States Supreme Court was denied on November 2, 1981. Brown v. Wainwright, 50 U.S.L.W. 3349 (1981).

The Appellant was considered for commutation under procedures established by the present Florida Governor on February 17, 1982. On March 22, 1982, the Governor of Florida denied the commutation

of clemency, and signed a death warrant authorizing the Appellant's execution on April 21, 1982 at 7:00 A.M. On April 13, 1982 the Appellant filed his petition for writ of habeas corpus in the United States District Court for the Northern District of Florida. The District Court summarily denied the petition for writ of habeas corpus on April 19, 1982. This is an appeal from the summary denial of the petition for writ of habeas corpus in the United States District Court in and for the Northern District of Florida.

SUMMARY OF THE ARGUMENT

1. The Appellant's rights against self-incrimination and to properly confront the evidence presented against him were violated when on cross examination the prosecutor used information derived from a court-ordered mental competency examination. The Appellant had been the subject of a pre-trial court-ordered mental examination in this cause and at the time of his examination was not advised that he had a right against self-incrimination. It is asserted that such evidence is not admissible in a penalty phase proceeding as well as in a trial proceeding without the constitutional protections prescribed by Estelle v. Smith, 451 U.S. 454 (1981). It is the contention of the Appellant that since this information was inadmissible, the trial court was in error when it permitted the prosecution to elicit such inadmissible evidence through the defendant's own testimony.

2. The trial court limited the consideration of relevant mitigating factors both through jury instructions and through direct rulings. Permitting the extreme punishment of death to be the result of a proceeding where there was a restriction of mitigating circumstances imposed would violate the Appellant's rights to protection against cruel and unusual punishment applied in a freakish manner. It is also noted that at the time of the Appellant's trial there was a prevailing view in the State of Florida that the Florida Statute setting out the scheme for procedure in death penalty

cases restricted the mitigating factors which may be presented to those listed in the statute itself. This view has changed through judicial interpretation since that date. The Appellant's counsel's adherence to the prevailing view concerning statutory interpretation should not be viewed as a waiver of any objection to such procedures.

3. The trial court erred in not preventing the prosecution to introduce evidence of prior acts of violence on the part of the Appellant without a substantiating predicate of prior convictions being shown. Thus, it is asserted that the state was allowed to introduce improper aggravating circumstances into the consideration of both the jury and the court at the penalty phase proceeding. The Florida Supreme Court systematically requested and received ex parte extra-record psychiatric, psychological, and correctional reports concerning the Appellant and other death sentenced appellants during the pendency of their capital appeals. The practice violated the Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments -- specifically his rights to due process of law; to the effective assistance of counsel; to reliability in capital sentencing; to proportionality in capital sentencing; and to be protected against self-incrimination, including the right to the assistance of counsel in deciding whether to exercise that right.

STATEMENT OF JURISDICTION

This Court has jurisdiction and is authorized by statute and an abundance of authority since substantial federal constitutional questions are presented in the petition for habeas corpus filed in the District Court. The Appellant has asserted that his conviction and sentence of death violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These contentions are within the jurisdiction conveyed upon the federal courts by 28 U.S.C. §2241(c)(3). See, Fay v. Noia, 372 U.S. 391, 399-426 (1963); Sheppard v. Maxwell, 384 U.S. 333 (1966); Maxwell v. Bishop, 398 U.S. 262 (1970). The constitutional issues raised by the Appellant in his habeas corpus petition have been decided adversely to his contentions by the Supreme Court of Florida on direct appeal. Booker v. State, 397 So. 2d 910 (Fla. 1981). The State remedies have been fully exhausted as required by 28 U.S.C. §2254(b).

I

ON CROSS-EXAMINATION OF THE APPELLANT DURING THE PENALTY PHASE WHERE AGGRAVATING CIRCUMSTANCES WERE CRITICAL ISSUES, THE PROSECUTOR'S USE OF INFORMATION DERIVED FROM A COURT-ORDERED MENTAL COMPETENCY EXAMINATION CONTRAVENED THE DICTATES OF ESTELLE v. SMITH REQUIRING THE APPELLANT'S DEATH SENTENCE TO BE SET ASIDE.

(A)

BECAUSE APPELLANT WAS NOT APPRISED OF HIS FIFTH AMENDMENT PRIVILEGE PRIOR TO THE COURT-ORDERED PSYCHIATRIC EXAMINATION, INFORMATION OBTAINED THEREIN COULD NOT BE USED AS EVIDENCE TO PERSUADE THE JURY TO RETURN A DEATH SENTENCE ACCORDING TO ESTELLE v. SMITH.

It is well established that the aggravating circumstances of Fla. Stat. §921.141(5) (1981) are "like elements of a capital felony in that the state must establish them". Ardango v. State, 411 So. 2d 172 (Fla. 1982). Thus, in the penalty phase of a capital case where aggravating circumstances are critical issues, the state still has the burden of proof beyond all reasonable doubt. Fla.R.Cr.P. 3.780. However, since Estelle v. Smith, 451 U.S. 454 (1981), the prosecution is prohibited from attempting to meet its burden through information obtained from a court-ordered mental competency examination where the Defendant was not apprised of his Fifth Amendment privilege. Application of Estelle v. Smith to the facts in the case subjudice requires Mr. Booker's death sentence to be set aside.

The record is uncontradicted and clearly indicates that prior to his court appointed psychiatric examination in order to determine competency to stand trial, Mr. Booker was not warned he had a right to remain silent and that any statements he made could be used against him. (R.298) Yet Petitioner's statements were used for cross examination by the prosecutor during the penalty phase to establish Mr. Booker's propensity, culpability and responsibility for the crimes charged. (R.243-44) This is the precise situation the Supreme Court held violative of the accused's Fifth Amendment Constitutional rights in Estelle v. Smith.

The testimony of Dr. James P. Grigson, a court appointed psychiatrist, formed the basis of respondent's challenge to his death sentence in Estelle v. Smith. During the penalty phase, Dr. Grigson's testimony derived from his 90 minute "mental status examination" of Mr. Smith, included such statements as "(a) Smith is a very severe sociopath; (b) that he will continue his previous behavior . . ." 451 U.S. at 460.

On certiorari, the Estelle v. Smith court recognized that at the sentencing hearing where Dr. Grigson testified regarding Mr. Smith's future dangerousness which was a critical issue, "the State used respondent's own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty." 451 U.S. at 466. In an 8:0 decision, the Supreme Court set aside Smith's death sentence and declared such

testimony violated the rule adopted in Miranda v. Arizona, 384 U.S. 436 (1966), since there is "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." Estelle v. Smith, 451 U.S. at 462-63 (footnote omitted).

The Estelle v. Smith holding is a logical progression of the procedural safeguards required by the Miranda decision. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981). Those Miranda safeguards are designed to protect the accused from "the compulsion to incriminate himself arising from a official custodial interrogation." Id. at 698. During the psychiatric interview which constitutes a custodial interrogation, the court appointed psychiatrist, is an agent of the state as is a police officer or prosecuting attorney. Estelle v. Smith, 451 U.S. at 467-68; Battie, 655 F.2d at 698-99. It makes no difference whether the motion for examination was initiated by the defense or prosecution, Battie, 655 F.2d at 702, although in the instant case the State Attorney desired the mental examination be performed. Accordingly, Miranda applies and Mr. Booker should have been advised of his Fifth Amendment privilege in light of Estelle v. Smith.

(B)

SINCE APPELLANT'S CONSTITUTIONAL PRIVILEGE WAS VIOLATED, THE PROSECUTION WAS ERRONEOUSLY PERMITTED TO ELICIT INADMISSIBLE EVIDENCE THROUGH THE DEFENDANT'S OWN TESTIMONY, ESTELLE v. SMITH.

Although those cases interpreting Estelle v. Smith involved the admissibility of the psychiatrist's testimony, rather than the Defendant's own testimony on the stand, the rationale behind the Fifth Amendment protection supports the extension of Estelle v. Smith to the facts in the case at bar. Petitioner's Memorandum of Law in Support of his Application for Stay of Execution clearly demonstrates that the prosecutor, on cross examination, used Mr. Booker's statements obtained during Petitioner's court-ordered psychiatric examination. (See pages 19-21). It is irrelevant that the information was elicited at the penalty phase through Mr. Booker, himself, rather than the psychiatrist.

"[A] defendant must be free to take the stand ... without fear that his testimony will permit the prosecution to introduce evidence illegally obtained from him and thus unavailable in the government's case-in-chief ... " United States v. Curry, 358 F.2d 904, 910 (2nd Cir. 1966). Admittedly, there are those situations where the government may use illegally obtained evidence to challenge the defendant's credibility should he resort to perjured testimony on the stand. Walden v. United States, 347 U.S. 62 (1954); United States v. Curry, 358 F.2d at 910-11. However, the instant case is not one of those situations involving perjury. Rather, one federal court recognized, "[t]he situation is analogous to the attempt to use defendant's testimony at a suppression hearing in a trial to

determine guilt." Collins v. Auger, 428 F.Supp. 1079, 1083 (S.D. Iowa, 1977). Indeed a defendant's testimony at a motion to suppress hearing is inadmissible at trial on the issue of guilt, Simmons v. United States, 390 U.S. 377 (1968), similar to an accused's statements during an examination to determine sanity or mental competency which is inadmissible on the issue of guilt in any criminal proceeding. 18 U.S.C. §4244 (1976). Since the Supreme Court makes no distinction for Fifth Amendment considerations between the guilt and the penalty phases in capital cases, Brief for Appellant at pages 2-3, the Collins court analogy is opposite in the case at bar.

At the penalty phase, the Appellant was compelled to sacrifice his Fifth Amendment Constitutional right to claim another -- the right to testify at his own trial. This represents an "intolerable" situation. Simmons, 390 U.S. at 394, accord, Collins, 428 F.Supp. at 1083. The Miranda court recognized that the Fifth Amendment which declares "[n]o person ... shall be compelled in any criminal case to be a witness against himself", goes "to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime." 389 U.S. at 439. Indeed the rationale articulated by the Supreme Court in support of suppressing statements violative of Miranda is directly applicable to Mr. Booker's cross examination:

"To maintain a 'fair state-individual balance', to require the government 'to shoulder the entire load', to respect the inviolability of the human personalty, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" 390 U.S. at 460 (Citations omitted) (Emphasis added).

The trial court erroneously permitted the prosecutor to utilize the substantive disclosures from the court appointed psychiatric reports obtained in violation of Appellant's constitutional rights. In addition to the self-incrimination issue, substantial equal protection implications arise. If the Appellant, rather than being an indigent, could have afforded a private psychiatric examination, the physician/patient relationship may have prevented the prosecutor's discovery of Petitioner's statements during the exam. See, Collins, 428 F.Supp. at 1084. That privileged relationship is not accorded an indigent defendant and his court appointed physcian. Id. Thus, the prosecutor's line of inquiry on Petitioner during the penalty phase violated the doctrines of Estelle v. Smith and Miranda v. Arizona, mandating that the Appellant's death sentence be vacated.

II

THE EXECUTION OF PETITIONER WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENT REQUIREMENTS OF INDIVIDUALIZED SENTENCING WHERE THE TRIAL COURT LIMITED CONSIDERATION OF RELEVANT MITIGATING FACTORS.

The most closely enforced constitutional requirement of

capital sentencing was expressly and directly violated in the present case. That Eighth and Fourteenth Amendment mandate requires that the process of imposing the "profoundly different" penalty of death provide for individualized sentencing determinations, allowing all aspects of the defendant's character, record and circumstances of the offense to be given independent mitigating weight. This constitutional dictate has been continually and strictly enforced by the Supreme Court of the United States from its 1976 capital decisions to its most recent capital decision and by the Court of Appeals (Fifth and former Fifth Circuits). Any restriction upon the presentation or consideration of mitigating evidence is constitutional error of the first magnitude. In the present case this constitutional requirement was violated by the preclusion of evidence, by the restriction of argument, by the instructions to the jury and by the sentencing judges.

The requirement of individual sentencing determination in capital cases is now well settled. E.g. Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion). That requirement is not simply a technical matter, but rather it lies at the very heart of Eighth and Fourteenth Amendment commands. The practical effects are of great import, as recognized in Woodson v. North Carolina, supra:

"A process that accords no significance to relevant facts of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subpenalty of death." Id. at 305.

Thus, in Lockett v. Ohio, 438 U.S. 586 (1978), the Supreme Court invalidated the Ohio capital sentencing statute which, although allowing consideration of three statutory mitigating circumstances, did not allow consideration of other nonenumerated mitigating factors:

"[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, ... not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Court's emphasis) 438 U.S. at 604.

Accordingly, "independent mitigating weight" must be given to all aspects of the "defendant's character and record and to circumstances of the offense." To allow otherwise would create "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty", and:

"When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (Emphasis supplied) 438 U.S. at 605.

The rule is therefore firmly established:

"To meet consitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." 438 U.S. at 608.

The sentencing procedure in the present case operated in precisely the same manner as the Ohio statute struck down in Lockett by precluding the consideration and presentation of mitigating factors.

(A)

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY DURING THE SENTENCING PHASE WITH RESPECT TO MITIGATING CIRCUMSTANCES LIMITED THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES IN VIOLATION OF APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The jury instructions at the sentencing phase of Appellant's trial limited the jury's consideration of mitigating circumstances to the seven statutory circumstances. "Nowhere in the trial court's charge to the jury in the sentencing phase of (Appellant's) trial is there any explicit instruction that the jury was free to consider mitigating factors other than the (seven) listed statutory factors." Washington v. Watkins, 655 F.2d 1346, 1369 (5th Cir. 1981), reh. and reh. en banc denied, ____F.2d____, December 3, 1981. The instructions in the instant case were strikingly similar to the instructions found to unconstitutionally restrict consideration of mitigating factors by the Fifth Circuit Court of Appeals in Washington v. Watkins, supra.

In Washington v. Watkins, supra, the jury was instructed on aggravated circumstances as follows:

> "Now consider only the following elements of aggravation in determining whether the death penalty should be imposed ..." Id. at 1367.

Two aggravating factors were then listed. As to mitigating circumstances the jury in Washington was instructed:

> "Now consider the following elements of mitigation in determining whether the death penalty should not be imposed ..." Id.

Two mitigating factors were then listed.

In comparison the jury in the present case was instructed on aggravating circumstances as follows:

> "The aggravating circumstances, which you may consider, are limited to such of the following, which may be established by the evidence ..." (R. 232)

And as to mitigating circumstances, the jury was instructed:

> "The mitigating circumstances which you may consider, if established by the evidence, are these ..." Id.

Only the statutory circumstances were listed. Additionally, prior to the sentencing trial, the jury was told that it would be instructed "on the factors in aggravation and mitigation that you may consider." Id. Accordingly, the instruction of the Mississippi trial court that were reviewed and found unconstitutional in Washington are very closely analogous to those given by the trial court in the case at bar.

Regarding the jury instruction reviewed in Washington, the Fifth Circuit Court of Appeals found that while the trial court properly limited the jury's consideration of aggravating circumstances, the language of the trial court's instruction on mitigating circumstances was so similar that:

> "... a reasonable juror might well infer from this parallel syntax that the enumerated factors -- both aggravating and mitigating -- were the sole factors that he was permitted to consider in the discharge of his oath." 655 F.2d at 1370.

To Appellee's argument that the difference in language between the instructions on aggravating and mitigating circumstances would lead the jury to believe that mitigating factors were not limited, the Fifth Circuit found that only "and extraordinarily attentive jury might rationally have drawn such an inference ...", but nontheless:

> "... at best the State's argument suggests that there is more than one reasonable interpretation of the crucial language in the charge; this does not mean the charge is not constitutionally inform, for the Supreme Court has held that whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." (Sandstrome v. Montana, 442 U.S. 510, 514 (1979)). Id. at 1370 (Emphasis by the Court).

The Fifth Circuit concluded that:

> "We must agree with Washington that the challenged jury instructions prevented the sentencer's consideration of nonstatutory mitigating factors in essentially the same manner as did the Ohio statute struck down by the Lockett court." Id. at 1373.

And further:

> "In short, under Lockett, the error in the trial court's proscription of jury consideration of nonstatutory mitigating circumstances was one of constitutional proportions that violated rights secured to Washington under the Eighth and Fourteenth Amendments; given that the entire purpose of the sentencing proceedings was to determine and balance aggravating against mitigating circumstances, that error unquestionably so infected the sentencing proceedings as to drain them of fundamental fairness." Id. at 1376.

Accordingly, just as the Court of Appeals found in Washington v. Watkins, supra, the court's charge to the jury in the present case unconstitutionally limited the jury's consideration of mitigating factors in violation of Lockett v. Ohio, supra. See also Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981).

Although this Court has recently decided nearly the identical issue adversely to Appellant in Ford v. Strickland, 676 F.2d 434 (11th Cir., April 15, 1982) (NO. 81-6200), at slip opinion, p.p. 9-10, the instant case is critically different from Ford in that there is nothing in the record to indicate -- as the Court thought there was in the Ford record -- that the trial judge understood his obligation to consider nonstatutory mitigating factors and that he "conveyed (this perception) to the advisory jury." Id. at slip opinion, p.p. 10.

> "Appellee argues that (Appellant's) counsel introduced some evidence of nonstatutory mitigating factors, and adverted to those factors in his closing argument. Washington v. Watkins, supra, at 1374, 1375. Appellee's argument, however, completely misses the point of the Supreme Court's holding in Lockett, supra. Sandra Lockett also introduced evidence of nonstatutory mitigating factors, and also argued their relevance to the sentencer. The fatal flaw in Lockett was not the exclusion of evidence relating to nonstatutory mitigating factors, but the limitation on the sentencer's consideration of that evidence except as it related to the statutory mitigating factors." 655 F.2d at 1375. (Emphasis added).

Appellee attempts to distinguish Washington on the basis of the concluding reference by the trial judge in Washington to the "preceeding elements of mitigation". However, the reliance

on the "preceeding elements" language is misplaced.

> While it is true that the Washington court found that language "further supported" the inference that the enumerated factors were exclusive from the judge's use of the term "only" with respect to aggravating factors and from the immediately following "almost exactly parallel" language pertaining to mitigating circumstances, these two features of the judge's instruction alone would have supported such inference. See Id. The "preceeding elements" language present in Washington was supportive, but clearly not the decisive factor in the court's decision. Id. Ford v. Strickland, supra, dissent, Kravitch, J., at slip opinion p.p. 5.

Appellee further purports to distinguish Washington from the fact that the charge to the jury in the instant case listed all the statutory elements of mitigation whereas in Washington the judge listed only two of the statutory factors. This is a "distinction without a difference". Id. at p.p. 5.

> "The issue we are here concerned with is whether the jury reasonably may have believed it was limited to considering mitigating evidence that fit within the statutorily enumerated factors. Whether the instructions set forth two, five, or a dozen statutory factors has no bearing on the jury's understanding of the defendant's right under Lockett v. Ohio, supra, to have it consider nonstatutory factors as well. At (Appellant's) sentencing hearing, as in Washington's and Lockett's, his attorney presented evidence concerning his character and background. "Nowhere in the trial court's charge to the jury in the sentencing phase of (Petitioner's) trial is there any explicit instruction that the jury was free to consider mitigating factors other than (those enumerated in the statute), however. 655 F.2d at 1365. In Washington, the court found that no language in the charge rectified the absence of such an instruction by indicating to a reasonable jury that it was not limited to the statutory factors. The court reached this conslusion despite the trial judge's prefatory instruction that in reaching its decision the jury "must obviously consider the detailed circumstances

> of the offense for which the defendant was convicted and the defendant himself". Id. at 1369-70. Here there was lacking even the vague reference to the defendant's character and circumstances that was present in the Washington case. Thus, the instructions given in Appellant's sentencing hearing were even less likely to effectuate Appellant's right to have the jury consider evidence of his character and background than the instructions invalidated in Washington." Id. at p.p. 5,6. (Emphasis added).

For the foregoing reasons, the instructions given to the jury at the sentencing phase of the trial did not adequately inform the jury of its duty to consider nonstatutory mitigating evidence under Lockett v. Ohio, supra. As most recently stated by the Supreme Court:

> "Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider as a matter of law, relevant mitigating evidence." Eddings v. Oklahoma, ____ U.S. ____, 50 U.S.L.W. 4161, 4164, (1982), Case No. 80-5727, decided January 19, 1982.

Thus, the judge's exclusion from consideration of all nonstatutory mitigating factors, as a matter of law, violated the principles followed and announced in Eddings v. Oklahoma, supra, and as a result, Appellant's death sentence must be vacated.

(B)

APPELLANT'S FAILURE TO OBJECT TO THE JURY INSTRUCTIONS DURING THE SENTENCING PHASE OF THE TRIAL OR TO RAISE THE PROPRIETY OF THE JURY INSTRUCTIONS ON DIRECT APPEAL TO THE STATE SUPREME COURT IS EXCUSED BECAUSE OF THE POSITION OF THE FLORIDA COURTS AT THE TIME OF THE TRIAL.

The record is uncontradicted that Appellant failed to object to the trial court's instructions to the jury during the sentencing phase of the trial. (R.262) Nor was the question of the propriety of these jury instructions raised on direct appeal to the State Supreme Court. Id. This procedural default is excused, however, because the trial judge's rulings in this case demonstrate that he believed that consideration of mitigating factors was limited only to those set out in the statute. As a result, valid mitigating factors were not considered by either judge or jury.

Based on Wainwright v. Sykes, 433 U.S. 72 (1977), the District Court held Appellant's failure to raise this issue on direct state appeal forecloses its consideration in a Habeas Corpus proceeding. Id. The Florida procedural law is clear. A criminal defendant's failure to raise an issue which could be asserted on direct appeal precludes consideration of the issue on a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Hargrave v. State, 396 So. 2d 1127 (Fla. 1981).

> In Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court held a state prisoner who knowingly and deliberately bypasses state procedures intentionally relinquishes known rights and can be denied habeas corpus relief on that basis. Recognizing Fay left open the possibility of "sandbagging" by defense lawyers the Supreme Court narrowed its sweeping rule in Wainwright v. Sykes, supra. The Court held that absent a showing of both cause for noncompliance and actual prejudice, habeas corpus relief is barred where a state prisoner has failed to comply with a state contemporaneous objection rule. While

> Sykes arose in the context of a procedural default at the trial level, its rationale (has been applied) in cases involving a procedural default during the course of a direct appeal from a state court conviction. See Huffman v. Wainwright, 651 F.2d 347 (5th Cir. 1981). Cause and prejudice are sometimes interrelated. Id. While the Supreme Court has not explicitly defined cause and prejudice, this Court has defined "cause" sufficient to excuse a procedural default in light of the determination to avoid "a miscarriage of justice". Id. Prejudice means "actual prejudice" which in this case must result from the failure to appeal the trial court's (instructions to the jury during the sentencing phase of the trial.) Ford v. Strickland, 676 F.2d 434 (11th Cir. April 15, 1982), (NO. 81-6200), slip opinon at p.p. 4,5,6.

A careful review of the record reveals that the Sykes exception does apply in this case. In restricting the consideration of mitigating factors to the statute, the trial judge "followed the law as he believed it was being interpreted at the time of trial". Perry v. State, 395 So. 2d 170, 174 (Fla. 1981). As the Florida Supreme Court recognized in Perry, there were misconceptions caused by the decision in Cooper v. State, 336 So. 2d 1133 (Fla. 1976) which, from a plain reading, limited consideration of mitigating circumstances to only those in the statute. Id. The Cooper decision was not reinterpreted and clarified by the Florida Supreme Court until Songer v. State, 365 So. 2d 696 (Fla. 1978) (opinion on rehearing). However the Songer reinterpretation was not announced until three months after the trail of the instant case. Consequently, the trial judge's instructions to the jury during the sentencing phase

were proper under the position of the Florida courts at the time of trial, and therefore no complaint can be made of the Appellant's failure to object contemporaneously to these jury instructions.

Furthermore, this Court recently addressed the merits of a similar claim in the case of Ford v. Strickland, 676 F.2d 434 (11th Cir. April 15, 1982) (NO. 81-6200), not withstanding Ford's clear procedural default.

III

BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF THE APPELLANT'S PRIOR ACTS OF VIOLENCE, WITHOUT THE REQUIRED INDICIA OF RELIABILITY OF PRIOR CONVICTIONS, THE TRIAL COURT PERMITTED THE JURY TO CONSIDER A NON-STATUTORY AGGRAVATING CIRCUMSTANCE.

On November 12, 1981, this Court held in another Florida death penalty case that the admission of evidence of nonstatutory circumstances, coupled with the jury instructions permitting consideration of any aggravating circumstances, violated the Eighth and Fourteenth Amendments' requirements that sentencing discretion be appropriately guided and rationally reviewable. Henry v. Wainwright, 661 F.2d 56, 58-59 (5th Cir. 1981). This case presents a new question closer related to the question decided in Henry but not expressly considered in Henry:

> Whether the admission of evidence of nonstatutory aggravating circumstances alone, even where the jury is instructed properly to consider only statutory aggravating circumstances, violates the Eighth and Fourteenth Amendments.

The Appellant submits that the Henry analysis likewise requires a death sentence to be set aside under these circumstances.

The evidence of nonstatutory aggravating circumstances admitted in the Appellant's trial was the evidence, discussed of Mr. Booker's having been involved in acts of violence prior to the homicide with which he was charged. These are the acts of violence that were discussed above in section one and were revealed during psychiatric evaluations ordered by the trial court. Since the Appellant was neither charged, convicted, nor subject to military administrative proceedings for any crime as a result of these acts, the evidence fell outside the scope of the statutory aggravating circumstances.[1] Moreover, the evidence was not properly elicited in order to rebut the statutory mitigating circumstance of "no significant history of prior criminal activity", Fla. Stat. §921.141(6)(a). By the time this evidence was elicited, the State had already introduced evidence of Mr. Booker's prior conviction for armed robbery as its only evidence in it's case-in-chief at the penalty phase. Cf. Booker v. State, 397 So. 2d at 918. Thus, the evidence of previous violent conduct was clearly evidence of a nonstatutory aggravating circumstance, which was inadmissible under Florida law. See Henry v. Wainwright, supra, 661 F.2d at 59.

Despite the court's instruction to the jury at Appellant's trial to consider only the statutory aggravating circumstances, he submits that the mere exposure of the jury to this inadmissible

[1]The statutory circumstance to which this evidence was most closely related, Fla. Stat. §921.141(5)(b), F.S.A., required a prior conviction for a felony involving violence to the person.

evidence, which was nonetheless allowed into evidence over the objection of counsel, "open[ed] too wide a door for the influence of arbitrary factors on the sentencing determination." Henry v. Wainwright, supra, 661 F.2d at 59. As the Tennessee Supreme Court has noted, in deciding that the admission of evidence of nonstatutory aggravating circumstances is itself violative of the Eighth Amendment:

> "[a]ny evidence that does not go to the proof of one or the other of those issues (statutory aggravating or mitigating circumstances) is irrelevant to the jury's deliberation. We cannot believe that the Legislature intended that irrelevant evidence be placed before the jury, fraught as such a procedure would be with the 'substantial risk that (the death penalty) would be inflicted in an aribitrary or capricious manner,' Greg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976)..."
>
> Cozzolino v. State, 584 S.W. 2d 765, 768 (Tenn. 1979).

Because it is just as difficult "to discern whether the improper nonstatutory aggravating factors exerted a decisive influence on the sentence determination," Henry v. Wainwright, supra, 661 F.2d at 59, under the circumstances of the Appellant's case -- where the jury was exposed to evidence of nonstatutory aggravating factors but later instructed to consider only statutory aggravating factors -- as it was under the circumstances of Mr. Henry's case, Henry should control, and Mr. Booker's death sentence should be set aside.

IV

THE SUPREME COURT OF FLORIDA'S SYSTEMATIC EX PARTE SOLICITATION AND COLLECTION OF PSYCHIATRIC, PSYCHOLOGICAL, AND CORRECTIONAL

REPORTS CONCERNING THE APPELLANT AND OTHER DEATH SENTENCED APPELLANTS DURING THE PENDENCY OF THEIR CAPITAL APPEALS VIOLATED THE APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The Supreme Court of Florida systematically requested and received ex parte extra-record psychiatric, psychological and correctional reports concerning Mr. Booker and other death-sentenced appellants during the pendency of their capital appeals. The practice violated Mr. Booker's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments -- specifically his rights to due process of law, Gardner v. Florida, 430 U.S. 349 (1977); to the effective assistance of counsel, Gardner v. Florida, supra; Anders v. California, 386 U.S. 738 (1967); to confrontation, Pointer v. Texas, 380 U.S. 400 (1965); to reliability in capital sentencing, Woodson v. North Carolina, 428 U.S. 280 (1976); to proportionality in capital sentencing, Woodson v. North Carolina, supra; and to be protected against compelled self-incrimination, including the right to the assistance of counsel in deciding whether to exercise that right, Estelle v. Smith, 451 U.S. 454 (1981).

The Supreme Court of Florida, since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. The information includes, but is not limited to: pre-sentence investigation reports concerning the capital offense under review or prior convictions unrelated

to the capital offense; psychiatric evaluations or contact notes; psychological screening reports; recitations of a capital defendant's refusal to submit to a psychiatric examination from which a report could be prepared; post-sentence investigation reports; probation or parole violation reports; and state prison classification and admissions summaries. Except as to some of the pre-sentence investigations pertaining to the offense on appeal the above information was requested and received without notice to the capital appellants or their attorneys. Upon information and belief, a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it, has, at the Court's direction, been destroyed or purged from the Court's files. As a result, it is no longer possible to identify all of the cases in which such information was requested or received.

Based upon the foregoing practice, an original action was filed in the Supreme Court of Florida, on September 29, 1980, on behalf of the Appellant and one hundred twenty-two (122) other death-sentenced appellants. By a motion accompanying that petition, petitioners requested that, if any of their allegations were materially controverted, a special master be appointed and other procedure instituted for resolving the resulting issues of fact. Petitioners' allegations were, however, not controverted. The Court issued an order to show cause and the respondent replied by filing a motion to dismiss

which neither disputed the facts alleged in the petition nor alleged any contrary facts. After hearing oral argument, the Supreme Court of Florida denied the petition on the merits. It held that:

> "Even if petitioners' most serious charges were accepted as true, as a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence." Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).

Drawing a distinction between sentence "'review'" and sentence "'imposition'" (ibid,; see also id. at 1333), the Court concluded that "[s]ince we do not 'impose' sentences in capital cases, Gardner presents no impediment to the advertent or inadvertent receipt of some non-record information." Id. at 1332 "[N]on-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence 'review'." Id. at 1332-1333. Accordingly:

> "As we view the case, ... appellate review can never be compromised in the constitutional sense required by Proffit [v. Florida, 428 U.S. 242 (1976)], by the receipt of any quantity of non-record information." Id. at 1333, n. 16.

"The upshot ... is that petitioners' claims are untenable." Id. at 1333. All relief was denied to each and every petitioner, and the court ordered that "[n]o petitions for rehearing will be entertained." Id. at 1334.

Petitioner, STEPHEN TODD BOOKER's original appeal was pending

in the Supreme Court of Florida from November 17, 1978 (the date the Notice of Appeal was filed) until March 28, 1981 (the date the Petition for Rehearing was denied). Petitioner's case was pending in the Supreme Court of Florida during the time the practice of the Court described above was on-going. Additionally, there is evidence that the Supreme Court of Florida actually reviewed at least one extra-record document: a post-sentence, prison-generated psychological report.

Although this court recently decided this issue adversely to Appellant in Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982), there are at least two reasons for reconsidering this issue in Appellant's case. First, this case is critically different from Ford in that there is evidence that the Supreme Court of Florida actually reviewed at least one extra-record document: a post-sentence, prison-generated psychological report. Moreover, in contrast to Ford, counsel for Mr. Booker had filed a discovery motion related to this issue prior to the District Court hearing. Second, the sharpness of the dissent in Ford on this issue, 676 F.2d at 450 (Kravitch, J., dissenting), the split on the merits of this issue by the two regularly sitting judges of this Court who sat on the Ford panel and the setting of Ford for rehearing en banc, 676 F.2d at 456, indicate that there is no conclusive determination of this issue as yet.

As Justice Marshall noted in his dissent from the denial of certiorar in Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981),

cert. den., ____ U.S. ____, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981), and Judge Kravitch noted in her dissent in Ford v. Strickland, 676 F.2d at 450, the Supreme Court of Florida has misinterpreted the requirements established by the United States Supreme Court in the 1976 death penalty cases, particularly Proffit v. Florida, 428 U.S. 242 (1976), and Gardner v. Florida, 430 U.S. 249 (1977).

In Gardner, the Supreme Court specifically considered the use of confidential information in the sentencing process. 430 U.S. 249 (1977). The Court recognized the severity and finality of imposition of the death sentence and the dramatic difference between executions and other state action, and noted that the sentencing process clearly must satisfy the Due Process Clause. Id. at 358. Thus, the Court held that imposition of the death sentence based partly on information which petitioner therein had no opportunity to deny or explain violated the Due Process Clause and (in Justice White's view) the Eighth Amendment. Id. at 362. The Court rejected Florida's argument that confidentiality is necessary to ensure receipt of maximum information, because the risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, outweighs the State's interest in the quantity of information received. Id. at 359. In so holding, the court noted that "[a]ssurances of secrecy are conducive to the transmission of confidences which may bear no closer relation to fact than the average rumor or item of gossip and may imply a pledge not to attempt independent

verification of the information received." Id.

The Court also rejected Florida's argument "that trial judges can be trusted to exercise their discretion in a responsible manner, even though they may base their decisions on secret information", as clearly foreclosed by Furman v. Georgia, 408 U.S. 238 (1972), and Proffit v. Florida, 428 U.S. 242 (1976), recognizing the importance of participation of counsel in evaluating "the relevance and significance of aggravating and mitigating facts" in the sentencing process. 430 U.S. at 360.

Finally, the Supreme Court held that, without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be unconstitutional pursuant to Furman v. Georgia and Proffit v. Florida.

As previously noted herein, the Supreme Court of Florida seeks to avoid the dictates of Gardner by distinguishing appellate review of death sentences from their imposition. Brown v. Wainwright, 392 So. 2d 1327, 1332-33 (Fla. 1981). As Judge Kravitch articulated in Ford v. Strickland, a holding that Gardner is inapplicable to non-record information encountered at the appellate level:

> "Must proceed from one or both of the following premises: that rational appellate review is not an essential component of capital sentencing procedures under the Eighth Amendment, or that use of non-record information without notice to the defendant will not undermine the reliability of appellate review in the same way Gardner recognized it would affect the reliability of initial sentencing." 676 F.2d at 454 (Kravitch, J., dissenting.).

The first premise is clearly erroneous -- "a rational appellate

review process is one of the two fundamental requirements of capital sentencing procedures established by the Supreme Court's 1976 death peanlty decisions." Id. (Citing Woodson v. North Carolina, 428 U.S. at 303, 305 (plurality opinion); Roberts v. Louisiana, 428 U.S. at 335 and n. 11. (plurality opinion)). Moreover, the Supreme Court "approved the Florida appellate review procedure on the premise that 'the Florida court has undertaken responsibility to perform its function of death sentence review with a maximum of rationality and consistence.'" Brown v. Wainwright, 100 S.Ct. at 543, 70 L.Ed.2d at 408 (1981) (Marshall, J., dissenting) (citing Proffit v. Florida, 428 U.S. at 258-59, (opinion of Stewart, J.)). The second premise is also erroneous. Ford v. Strickland, 676 F.2d at 454 (Kravitch, J., dissenting). "Gardner suggested no relevant distinction between the trial court's initial imposition of a sentence and an appellate court's discharge of its mandatory review function". such a distinction being "irreconcilable" with Proffit's premise -- rational ane consistent review. Brown v. Wainwright, 100 S.Ct. at 543, 70 L.Ed.2d at 408 (Marshall, J., dissenting). Nor is such a distinction logically suggested.

> "[T]he risk that an appellate court's reliance on non-record information, without providing notice to the defendant of the substance of that information or an opportunity to contest its accuracy, will result in the affirmance of a sentence on the basis of erroneous or misinterpreted information presents as grave a threat of the arbitrary imposition of death condemned in Furman as the risk involved when such a procedure is engaged in by the initial sentencer." Ford v. Strickland, 676 F.2d at 454 (Kravitch, J., dissenting).

Further, exposure to "ex parte, unreliable, non-record information", "contested by the adversary process", may distort the Supreme Court of Florida's appellate function, rendering review for proportionality meaningless. Brown v. Wainwright, 100 S.Ct. at 544, 70 L.Ed.2d at 408 (Marshall, J., dissenting).

The Supreme Court of Florida's attempt to avoid the dictates of Gardner by insisting "that fact finding is foreign to its appellate review function and that any non-record information received was therefore superfluous" must also fail. Ford v. Strickland, 676 F.2d at 454-55 (Kravitch, J., dissenting). Florida's attempt to deemphasize the evidentiary review aspect of its appellate review function (Brown v. Wainwright, 302 So. 2d at 1331-33) is belied by Proffit v. Florida, wherein the Supreme Court upheld Florida's appellate review system because the risk that the death penalty will not be imposed in an arbitrary and capricious manner was minimized because "evidence of aggravating and mitigating circumstances is reviewed and re-weighed by the Supreme Court of Florida 'to determine independently whether the impositon of the ultimate penalty is warranted'." 428 U.S. at 253 (citing Songer v. State, 322 So. 2d 481, 484 (1975), and Sullivan v. State, 303 So. 2d 632, 637 (1974)). See also Ford v. Strickland, 676 F.2d at 455 (Kravitch, J., dissenting).

Moreover, as noted by Justice Marshall, "[i]f the court does not use the disputed non-record information in performing its appellate function, why has it systematically sought the

ormation?" Brown v. Wainwright, 100 S.Ct. at 454, 70 L.Ed.2d 408 (Marshall, J., dissenting). In fact, the Supreme Court Florida has admitted that it does use the "'tainted' information to deal with newly-articulated procedural standards." Brown Wainwright, 392 So. 2d at 1333, n. 17. This mysterious use non-record information and the mysterious purpose for requesting all "underscore the need for a complete factual record". d v. Strickland, 676 F.2d at 455 (Kravitch, J., dissenting). recognized by Justice Marshall:

> "[P]etitioners are not asking permission to examine the thought processes of appellate judges, or to obtain disclosure of each item of judicially noticeable non-record information considered on appeal. They are asking permission to examine and dispute the accuracy or completeness of non-record information submitted to the court pertaining to that individual appellant." Brown v. Wainwright, 100 S.Ct. at 544, 70 L.Ed.2d at 409 (Marshall, J., dissenting).

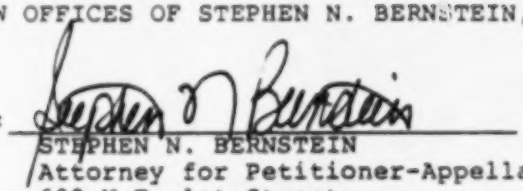
Accordingly, Petitioner respectfully prays that this Court ate the death sentence imposed in this case and remand it to Supreme Court of Florida with appropriate directions.

CONCLUSION

For all the foregoing reasons, this Court should reverse Order below denying Petitioner's habeas corpus petition should grant habeas corpus relief vacating the unconstitu- nal conviction and the death sentence imposed upon him or the very least allow him the opportunity to complete dis- ery requested below so that all matters could be completely igated.

Respectfully submitted,

LAW OFFICES OF STEPHEN N. BERNSTEIN, P.A.

BY: 

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CERTIFICATE OF SERVICE

I, STEPHEN N. BERNSTEIN, hereby certify that on August 24, 1982, I served the foregoing Reply Brief for Petitioner-Appellant and Record by United States Mail to Jim Smith, Attorney General, The Capitol, Tallahassee, Florida 32301.

STEPHEN N. BERNSTEIN

82-5468

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

STEPHEN TODD BOOKER,

Petitioner/Appellant,

-vs-

LOUIE L. WAINWRIGHT,

Respondent/Appellee.

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Nature of Preference

Denial of Petition for Writ of Habeas Corpus

BRIEF OF RESPONDENT/APPELLEE

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STATEMENT REGARDING PREFERENCE

This appeal is entitled to preference in processing and disposition on the basis that it is an appeal from a federal district court's denial of a petition for writ of habeas corpus. See Appendix One of the Interim Rules of the United States Court of Appeals for the Eleventh Circuit.

STATEMENT REGARDING ORAL ARGUMENT

The State of Florida requests oral argument in this case. Oral argument is necessary to insure that the integrity of a State court Judgment and Sentence is maintained.

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STATEMENT OF THE ISSUES

THE ISSUE OF WHETHER THE STATE'S CROSS-EXAMINATION OF APPELLANT DURING THE SENTENCING PHASE VIOLATED ESTELLE V. SMITH IS NOT COGNIZABLE ON FEDERAL HABEAS CORPUS BECAUSE APPELLANT WAIVED THIS CLAIM BY FAILING TO OBJECT UPON FEDERAL CONSTITUTIONAL GROUNDS AT TRIAL AND BY FAILING TO RAISE IT ON DIRECT APPEAL TO THE SUPREME COURT OF FLORIDA.

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RECORD CITATIONS

Citations to the Federal Court Record will be made by the use of the symbol "R," followed by the appropriate page number. Citations to the Panama City Hearing in front of Judge Higby will be specifically identified each time reference is made to pages of the transcript. Citations to the State Court Record will be made by use of the symbols "SR," followed by the appropriate page number. It is important to note that the entire state court record was filed as an exhibit at the Panama City Hearing. Some documents, such as personal letters from Appellant and psychological reports requested by defense counsel, although they were not part of the paginated state court record, were furnished to Judge Higby. When the record was furnished this Court from the clerk of the Federal District Court for the Northern District of Florida, the exhibits filed by the State were not made part of the record on appeal because Deputy Clerk Kembra Smith informed the Clerk of the Northern District that this Court had a complete copy of the state court record. The State had filed a duplicate exhibit in this Court on the day this Court granted a stay of execution. Should confusion arise because of the status of the record, the State would respectfully request that an opportunity be provided to clear the matter up before the missing documents, if any, are deemed non record material and therefore not capable of being considered.

STATEMENT OF THE CASE

The State of Florida accepts Booker's statement of the case only insofar as it sets forth the course of proceedings and dispositions in the state courts and the federal district court. The following additions and clarifications are noted. During the hearing in Panama City on April 15, 1982, before Federal District Judge Lynn C. Higby, defense counsel stated that other than the "Brown issue" (addressed in Issue IV of this brief), there were no evidentiary issues raised in his application for stay of execution and petition for writ of habeas corpus (Transcript of April 15, 1982, Hearing at 4, 53, 54).

At the conclusion of the Panama City Hearing, Judge Higby orally denied Appellant's application for stay and on April 19, 1982, he entered a written order denying the stay (R-259). Also on April 19, Judge Higby signed a Certificate of Probable Cause and Certificate to Permit Appeal in Forma Pauperis which was filed the same day in the clerk's office of the United States District Court for the Northern District of Florida. Apparently later that day, he signed another order, this time denying Appellant's Application for Certificate of Probable Cause and to Proceed to Appeal in Forma Pauperis, and this order was filed in the clerk's office the next morning (R-273). Because of the confusion caused by Appellant's last minute pleadings in the state courts and the federal district court, this Court

apparently was unable to ascertain that Judge Higby's last order was the one that denied a certificate of probable cause:

> In the limited time available to this court to examine the procedure, it is unclear whether or not the district judge granted or denied petitioner's application for a certificate of probable cause to appeal, there being in the papers furnished to us what appears to be an order granting same and another order of denial, both dated April 19, 1982. Petitioner alleges that the certificate of probable cause was denied.

(Order Granting Staying at p. 3). On April 20, 1982, Judge Higby entered a Supplemental Order Denying Certficate of Probable Cause, in which he stated that the certificate was "denied because the lawsuit and the appeal are meritless." (R-274)

STATEMENT OF THE FACTS

Appellant has totally failed to include in his statement of the case the statement of facts required by Rule 22 of the Rules of the United States Court of Appeals for the Eleventh Circuit. Accordingly, the State submits the statement of facts as summarized by the Supreme Court of Florida on Appellant's direct appeal in that court:

> This is an appeal from a judgment adjudicating defendant guilty of murder in the first degree and an order imposing a sentence of death. We have jurisdiction. Art. V §3(b)(1), Fla. Const. (1972).
>
> Defendant was also adjudged guilty of sexual battery and burglary, receiving a sentence of fifty-five years for sexual battery and thirty-five years for burglary.
>
> The victim, an elderly woman, was found dead in her apartment in Gainesville, Florida. The cause of death was loss of blood due to several knife wounds in the chest area. Two knives, apparently used in the homicide, were embedded in the body of the victim. A pathologist located semen and blood in the vaginal area of the victim and concluded that sexual intercourse had occurred prior to death. The apartment was found to be in a state of disarray; drawers were pulled out and their contents strewn about the apartment. Fingerprints of the defendant were positively identified as being consistent with latent fingerprints lifted from the scene of the homicide. The defendant had a pair of boots which had a print pattern similar to those seen by an officer at the scene of the homicide.

> Test results indicated that body hairs found on the clothing of the defendant at the time of his arrest were consistent with hairs taken from the body of the victim.
>
> After being given the appropriate warnings, the defendant made a statement, speaking as an alternative personality named "Aniel." The "Aniel" character made a statement that "Steve had done it."
>
> The indictment returned by the grand jury charged the defendant with murder in the first degree, sexual battery, and burglary. A motion for mental examination and notice of defense of insanity were filed on behalf of the defendant and he was examined by three psychiatrists.
>
> The defendant entered a plea of not guilty, but did not testify during the guilt phase of the trial. He was found guilty on all three counts of the indictment.
>
> During the sentencing phase of the proceedings the defendant testified. At the conclusion of his testimony, and against the advice of his attorney, the defendant made a statement to the jury saying, "A defendant found guilty of such a crime should recieve the death penalty." The jury recommended the death penalty and defendant was sentenced to death. This appeal resulted.

Booker v. State, 397 So.2d 910, 912-913 (Fla. 1981).

After Appellant had been convicted and after the jury had recommended a death sentence, his attorney requested that the trial court consider a psychological report prepared by Elizabeth A. McMahon, Ph.D. The trial court also considered a personal letter from Appellant, in which Appellant while still claiming he could

not remember the crime, informed the trial court that he was glad he had been found guilty because his fingerprints had been found in the elderly victim's apartment. Appellant also wrote:

> I want the maximum penalty for the crimes that I was found guilty of. I want you to impose on me the sentence of death in the electric chair.
>
> Signed,
>
> Steven T. Booker

Appellant also informed the Court that on many occasions he had awakened "spattered with blood, not knowing where it came from." Dr. McMahon's psychological report and Appellant's personal letter to the trial court have been included in an appendix to this brief. These documents were filed before Judge Higby, but since they were not a paginated portion of the State Court record they were not forwared to this Court from the federal district court. The fact that the trial court had before him these documents is evidenced by the trial court's Judgment and Sentence (SR-142).

While Appellant's appeal was pending in the Supreme Court of Florida, the clerk of that Court ordered the Florida Department of Corrections to transmit to him Appellant's presentence investigation. Notice was given to counsel for the State and to Appellant's trial counsel, Stephen N. Bernstein. A copy of this order was filed as an exhibit in front of Judge Higby and it can be found in an appendix to this brief.

SUMMARY OF THE ARGUMENT

I.

The Federal District Court was precluded from considering this claim on habeas corpus because Appellant failed to apprise the state courts of Florida that his federal constitutional rights had been violated. At trial, Appellant's objection was based upon state evidentiary grounds in that he accused the prosecutor of formulating certain questions on his cross-examination of Appellant from psychiatric reports which had previously been ordered closed by the Court. At no time did he advise the trial court that his fifth amendment right against self-incrimination had been violated. Therefore, review on this claim is precluded under Engle v. Isaac, ___ U.S. ___, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

Appellant's claim must fail even if the Court disregards the procedural default issue. This is because the fifth amendment does not become involved in situations in which a criminal defendant voluntarily requests a psychiatric examination to support his defense of insanity. Estelle v. Smith, 451 U.S. 454, 465, 101 S.Ct. 1866, 68 L.Ed.2d 359, 370 (1981). Finally, to the extent that this Court finds Estelle v. Smith applicable to Appellant's case, Appellant still cannot obtain relief because he waived whatever privilege he had against compulsory self-incrimination by voluntarily taking the witness stand and

subjecting himself to cross-examination and impeachment. United States v. Havens, 446 U.S. 620, 628, 100 S.Ct. 1912, 64 L.Ed.2d 549 (1980). By opening the door during direct examination, Appellant subjected his credibility to impeachment by the prosecution just like the credibility of any other witness. Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954).

II.

The issue of whether Appellant's death sentence was improper because the trial court allegedly restricted consideration of relevant mitigating evidence is also barred from consideration on federal habeas corpus because of the Sykes-Engle doctrine. The federal district judge found that Appellant had waived this issue by failing to raise the issue in state court (R-262). The Court should not be misled by the fact that on direct appeal to the Florida Supreme Court, Appellant did raise a claim pursuant to Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). However, this claim was specifically limited to a general attack on Florida's death penalty statute, and it is significant that this is not the same claim which is now being asserted. To the extent that Appellant is now alleging specific violations of Lockett, unless he can now show cause for his procedural defaults in state court, he is barred from raising them at this stage pursuant to the Sykes-Engle doctrine.

Appellant's attempt to justify his cause for not raising the jury instruction issue in state court must fail in light of Engle, supra, in which the United States Supreme Court clearly stated that the futility of preventing an objection to the state courts could never constitute cause for a failure to object at trial. Id. at 71 L.Ed.2d 802.

Appellant's claim must also fail because he never even attempted to demonstrate "actual prejudice." United States v. Frady, ___ U.S. ___, 102 S.Ct. ___, 71 L.Ed.2d 816 (1982). Prejudice cannot be presumed. Hopper v. Evans, ___ U.S. ___, 102 S.Ct. ___, 72 L.Ed.2d 367 (1982).

Finally, Appellant's argument on this issue must fail even if the Court considers it on its merits. This is because the record conclusively demonstrates that Appellant submitted evidence of numerous non-statutory mitigating factors both to the jury and the trial court. This fact also demonstrates that Appellant's attempt to show cause must fail because his counsel was obviously aware of the correct status of the law when he tendered a large amount of non-statutory mitigating evidence. The trial court found that the aggravating circumstances were outweighed by insufficient mitigating circumstances -- since no statutory mitigating circumstances were found, this necessarily means that the trial court considered all the evidence that had beem submitted in mitigation. See also the trial court's

judgment and sentence (SR-142-150) in which the trial court recites a list of non-statutory mitigating factors which were considered by him.

Appellant's case is unlike Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), because the Mississippi statute affirmatively precluded consideration of non-statutory mitigating evidence, whereas in Appellant's case it is obvious from the record and the trial court's findings that the jury was allowed to consider any relevant evidence submitted by Appellant. Finally, the record is clear that the jury was instructed that its advisory opinion was based upon all the evidence and that all the evidence must be considered when evaluating mitigating circumstances (SR-874-877). Appellant's case is identical to the situation in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978).

III.

The record in Appellant's case affirmatively shows that no non-statutory aggravating circumstances were considered by either the trial court or the jury. In fact, Appellant's jury was specifically instructed that it was limited in its consideration of the aggravating factors to those specifically listed in the statute (SR-874).

The trial court, the Florida Supreme Court, and Judge Higby all found that the evidence complained of was legitimate impeachment evidence. In other words, had the State not been allowed to impeach Appellant's proffer of his contention that he had not been involved in substantial criminal activity, the State would not have been able to negate this statutory mitigating circumstance. The evidence came in for the limited purpose of negating Appellant's evidence of a statutory mitigating circumstance. This is permitted under Florida law.

Appellant's case is dissimilar to Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), vacated, ___ U.S. ___, 102 S.Ct. 2922, 73 L.Ed.2d ___, (1982) and Proffitt v. Wainwright, ___ F.2d ___, (11th Cir. 1982). In those cases, it is clear that the Florida Supreme Court threw out non-statutory aggravating circumstances which had been improperly found by the trial court. In Appellant's case, however, the Florida Supreme Court upheld the finding of all the aggravating circumstances, and the Court further explained that the evidence was permitted under Florida law in order to impeach Appellant and negate his proffer of evidence which would support the finding of a statutory mitigating circumstance.

IV.

Appellant's argument must fail because he has not alleged before Judge Higby and does not now contend that the Supreme Court of Florida ever considered ex parte documents in his case. Judge Higby noted this fact, and he found that the record in Appellant's case affirmatively showed that nothing ex parte was considered. (R-266). A federal habeas court cannot presume prejudice Hopper v. Evans, supra, and Judge Higby correctly refused to guess at whether the Florida Supreme Court had done anything wrong absent some factual allegation of misconduct in Appellant's particular case.

Judge Higby also found that regardless of the propriety of what the Florida Supreme Court had done prior to its decision in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), he could not presume that this practice was continued in Appellant's case because Appellant's case was decided three months after the Supreme Court of Florida rendered its opinion in Brown. See Harris v. Rivera, ___ U.S. ___, 102 S.Ct. ___, 70 L.Ed.2d 530 (981).

ARGUMENT

I.

THE ISSUE OF WHETHER THE STATE'S CROSS-EXAMINATION OF APPELLANT DURING THE SENTENCING PHASE VIOLATED ESTELLE V. SMITH IS NOT COGNIZABLE ON FEDERAL HABEAS CORPUS BECAUSE APPELLANT WAIVED THIS CLAIM BY FAILING TO OBJECT UPON FEDERAL CONSTITUTIONAL GROUNDS AT TRIAL AND BY FAILING TO RAISE IT ON DIRECT APPEAL TO THE SUPREME COURT OF FLORIDA.

A. APPELLANT FAILED TO APPRISE THE STATE COURTS OF HIS FEDERAL CLAIM.

It is now undisputed that a state prisoner is barred from raising on federal habeas corpus claims which were not presented in terms of federal constitutional law to the state courts. Engle v. Isaac, ___ U.S. ___, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). This is true whether the default occurred at trial or on direct appeal. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (procedural default at trial); Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977), Forman v. Smith, 633 F.2d 634 (2nd Cir. 1980) (failure to raise federal constitutional issues on direct appeal).

During the sentencing phase, the State's cross-examination of Appellant began with general questions concerning Petitioner's hospitalization for mental difficulties. The fact that Appellant had been hospitalized at least three times for mental problems

had already been brought out on direct examination by defense counsel (SR-836) (presumably in an attempt to establish non-statutory mitigating evidence which will be addressed later in this brief). Appellant had also volunteered that he had been hospitalized twice while he was in the Army stationed in Okinawa (SR-837). The State then cross-examined Appellant concerning his activities in Okinawa which involved his going into houses of prostitution and striking people with claw hammers. This testimony was not objected to (SR-842). Cross-examination then continued concerning Appellant's alcohol problems and the fact that he had been in an alcohol treatment center in Gainesville prior to his commission of the murder (SR-843). It was not until the State questioned Appellant about his activities on the day of the murder that defense counsel objected. The record reveals that there was an unreported bench conference (SR-844). At the conclusion of the cross-examination and after the jury had been instructed, Appellant's counsel stated his objections for the record. However, his specific objection concerned questions about the day of the murder rather than what had occurred in Okinawa:

> MR. BERNSTEIN: Your Honor, for the record if I may --
>
> THE COURT: Yes. It was understood that you had a motion that you would make at this time that would be considered the same as if you had made it at the appropriate time.

> MR. BERNSTEIN: Thank you, Your Honor. At this time I would move to strike all of the cross-examination supplied by psychiatric reports in this case. Specifically I refer to questions that related to activities during the morning of November 9th, 1977 and what actions took place during that morning or what statements may have been made or what thoughts may have been had.

(SR-880). At no time during the colloquy did defense counsel ever argue that Appellant's Fifth and Sixth Amendment rights had been violated. Instead, he argued merely that it was improper for the State to use information derived from the psychiatric reports because the Court previously had ordered the reports to be closed (SR-880).

The prosecutor then argued that he had not mentioned the psychiatric reports, and he stated that some of the questions were derived from sources other than the psychiatric reports (SR-881). Defense counsel then countered with the argument that he was not concerned with Appellant's answer to the questions but the issue was whether the subject matter of the questions "came out of the confidential reports." The trial court rejected this argument, however:

> [The Court] I don't know that, but I know this: that was the ruling of the Court at the time, and I told you at the sidebar that it would be the ruling of the Court that you opened up the question of what the defendant remembered and how well he did not remember certain things and how well he did remember certain things.

> And accordingly it was the judgment and ruling of the Court that the State Attorney that having been opened had a right to inquire as to what he remembered about that date and that date only. He could not go any further than that, and he was instructed not to go further than that.

(SR-882).

Therefore, it is clear from the record that the objection, once it was made, did not refer to events which occurred on Okinawa, but rather, referred only to activities of Appellant on the day of the murder. Thus, neither the trial court nor the Supreme Court of Florida was ever confronted with the federal constitutional grounds now being asserted, and this claim is not cognizable on federal habeas corpus. Sykes-Engle.

The State of Florida recognizes that recent opinions from this circuit as well as other circuits stand for the proposition that the State is precluded from asserting waiver via procedural default pursuant to the Sykes-Engle doctrine because of the State's failure to raise the Sykes-Engle doctrine in the district courts. This is not true in Appellant's case, and the State emphatically asserts that the record supports the fact that the procedural default issue has not been waived.

For example, procedural default was raised as early as the State's opposition to certiorari brief in the United States Supreme Court. See pp. 4-5 of that brief which was filed as an

exhibit with Judge Higby. Also, the transcript of the hearing in front of Judge Higby reveals that the State relied upon Appellant's double default to preclude Judge Higby from considering this issue. See pp. 18-20 of the April 15, 1982, hearing on Appellant's Application of Stay of Execution.[1] In fact, defense counsel candidly admitted to Judge Higby that at trial he "did not stand there and say I am arguing on the fifth amendment right against self incrimination as provided in the federal constitution." (T-21). Instead, he argued that he had "sufficiently" presented the federal issue to the trial court. However, Justice O'Connor specifically rejected this type of argument when she stated that habeas petitioners could not be permitted to recast state claims in terms of federal constitutional law. Engle, supra at 68 L.Ed.2d 796. Therefore, it is patently clear that Appellant failed to present his Estelle v. Smith argument to the trial court because he failed to object on those grounds at trial, and it is equally clear that Appellant failed to present this issue to the Supreme Court of Florida.

---

[1]Because of the short notice provided to the Florida Attorney General of the April 15, 1982, hearing in Panama City, the State of Florida was unable to file written pleadings alleging the double default pursuant to the Sykes-Engle doctrine. However, as stated above, the proper argument was made to Judge Higby, and he was able to ascertain the State was correct because the State was able to file a copy of the state court's record on appeal. Also, the applicability of the Sykes-Engle doctrine was raised in the "eleventh hour" Response to Application for Stay of Execution filed by the undersigned counsel in this Court on the day the stay was granted. See pp. 7-8 of that response.

B. ESTELLE V. SMITH DOES NOT COVER SITUATIONS IN WHICH A DEFENDANT VOLUNTARILY REQUESTS A PSYCHIATRIC EXAMINATION FOR THE PURPOSE OF PROVING INSANITY.

Assuming only for the sake of argument that the Court reaches the merits of Appellant's Estelle v. Smith[2] claim, despite Appellant's total failure to demonstrate cause for his procedural double-default and actual prejudice, Appellant's argument must fail on the merits. This is because Appellant's case does not present the issue decided by the United States Supreme Court in Estelle v. Smith. In that case, Texas prosecutors used psychiatric reports during the sentencing phase as evidence of "future dangerousness" to support the imposition of the death penalty. The Texas defendant had not been provided Miranda warnings prior to the interview with the psychiatrist and his defense counsel had not been notified in advance that the psychiatric examination would encompass the issue of the defendant's future dangerousness. In Appellant's case, however, the psychiatric examination was requested by him when he filed a Motion for Mental Examination and Notice of Defense of Insanity approximately one week after the murder (SR-4, 5). Thus, Appellant's situation was entirely different. This principle was specifically noted in Estelle v. Smith:

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[2]451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

> Nor was the interview analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his defense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the state of the only effective means it has of controverting his proof on an issue that he interjected into the case.

Estelle v. Smith at 451 U.S. 465, 68 L.Ed.2d 370.

C. APPELLANT WAIVED ANY PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION HE MIGHT HAVE HAD BECAUSE HE VOLUNTARILY TOOK THE STAND AND SUBJECTED HIMSELF TO CROSS-EXAMINATION AND IMPEACHMENT.

Finally, even though Judge Higby reached the merits of Petitioner's claim, he correctly agreed with the Supreme Court of Florida that no fifth amendment violation had occurred. This is because both he and the Supreme Court of Florida[3] recognized that the allegedly improper questions had been prompted by defense counsel's opening the door during direct examination:

> During the cross-examination there was no reference made by the prosecutor to the psychiatrist or to the psychiatric reports. The defendant opened up the

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[3]It is clear from the Florida Supreme Court's opinion that this issue was treated as a question of state evidentiary law rather than a federal constitutional question. Booker v. State, 397 So.2d 910, 914 (Fla. 1981). This state law construction afforded by the Florida court necessarily supports the application of the Sykes-Engle doctrine to bar federal habeas corpus review.

> question of what he remembered and whether he did or did not remember certain things. The trial court was correct in ruling that the state attoney had a right to inquire as to what defendant remembered, as this was an issue presented by the defendant during the sentence proceedings. Furthermore, the record does not conclusively show that the state attorney secured this information from the psychiatric reports.

Booker v. State, 397 So.2d 910, 914 (Fla. 1981). The federal district judge also found that the "questions complained of were relevant impeachment of Booker's testimony." (R-266).

Judge Higby and the Florida Supreme Court were correct because it is fundamental that a defendant who chooses to testify waives his privilege against compulsory self-incrimination, regardless of why the defendant was motivated to testify. Harrison v. United States, 392 U.S. 219, 222, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968). A defendant's statements made in response to proper cross-examination which is reasonably suggested by the defendant's direct examination are subject to impeachment by the prosecution -- this is true even if the evidence used to impeach has been illegally obtained or is otherwise inadmissible as substantive evidence of guilt during the prosecution's direct case. United States v. Havens, 446 U.S. 620, 628, 100 S.Ct. 1912, 64 L.Ed.2d 549 (1980). When defense counsel opens the door during direct examination, a criminal defendant's credibility can be attacked by the prosecution just like the credibility of any other witness. Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954).

In summary, Appellant's claim must fail for several reasons. First, it is clear that he is precluded from raising this claim in federal court because of the Sykes-Engle doctrine and his procedural double-default in the state courts of Florida. Second, Appellant's case does not present the issue decided in Estelle v. Smith, supra, because the United States Supreme Court recognized in that case that in a similar situation the Fifth Amendment does not become an issue. Id. at 454 U.S. 465, 68 L.Ed.2d 370. Finally, assuming only for the sake of argument that Appellant had a viable claim on this issue, he waived his privilege against compulsory self-incrimination by voluntarily taking the stand and subjecting himself to impeachment. United States v. Havens, supra. This point is without merit.

ARGUMENT

II.

THE ISSUE OF WHETHER THE TRIAL COURT LIMITED CONSIDERATION OF RELEVANT MITIGATING FACTORS DURING THE SENTENCING PHASE OF APPELLANT'S TRIAL IS NOT COGNIZABLE ON FEDERAL HABEAS CORPUS BECAUSE APPELLANT WAIVED THIS CLAIM BY FAILING TO OBJECT UPON FEDERAL CONSTITUTIONAL GROUNDS AT TRIAL AND BY FAILING TO RAISE IT ON DIRECT APPEAL TO THE SUPREME COURT OF FLORIDA.

Appellant next contends that his death sentence was improper because the trial court allegedly restricted consideration of relevant mitigating evidence during the sentencing phase of trial. However, as in the previous point on appeal, this issue was barred from the district judge's consideration because of Booker's failure to object at trial and failure to raise the issue on direct appeal contrary to the Sykes-Engle doctrine. Judge Higby agreed with the State's waiver argument, and he specifically found that "[b]y not raising the issues in state court Booker has waived them." (R-262) The state court record and the transcript of the hearing in Panama City before Judge Higby fully support Judge Higby's conclusion that the Sykes-Engle doctrine precluded federal habeas corpus review on this issue.

A. ON DIRECT APPEAL, APPELLANT'S LOCKETT CLAIM WAS LIMITED TO A GENERAL ATTACK ON THE STATUTE.

On direct appeal to the Florida Supreme Court, Booker's Lockett[4] claim was limited to a general attack on Florida's death penalty statute. See Appellant's Initial Brief filed in the Florida Supreme Court at 25-28, where he argued that §921.141, Fla. Stat., violated Lockett because the jury was not required to make factual findings to support its advisory sentence of death. It is significant to note that Appellant is no longer making this precise claim. This is because the issue was decided directly adversely to him in Spinkellink v. Wainwright, 578 F.2d 582, 620-621 (5th Cir. 1978). See also Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982). Therefore, this specific claim has no merit, and unless Appellant can show both cause and prejudice for his procedural defaults, any specific violation of Lockett is barred from federal habeas review by the Sykes-Engle doctrine which was relied upon by the State at the hearing before Judge Higby.

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[4]Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

B. THE RECORD REVEALS APPELLANT FAILED TO DEMONSTRATE CAUSE

Counsel for Appellant has candidly recognized that he failed to object to the jury instructions at trial (Brief of Appellant at 25):

> THE COURT: All right, The jury room is closed, but the jury has not yet probably had time to commence deliberations. Does either counsel take exception to the instructions of the Court or what the Court did?
>
> MR. BERNSTEIN [DEFENSE COUNSEL]: Your Honor, not as to the instructions.

(SR-79). Appellant's counsel has also candidly recognized that he failed to raise this issue on direct appeal to the Supreme Court of Florida (Brief of Appellant at 25). Therefore it is undisputed by both parties that a procedural double default occurred on this issue. The only question is whether Appellant has shown cause and actual prejudice to excuse his waiver of this issue pursuant to the Sykes-Engle doctrine. The State submits that he has not.

At the hearing in Panama City before Judge Higby, defense counsel apparently attempted to establish cause for his double-default by arguing that at the time of Appellant's trial the jury instructions were correct according to the status of the law at that time. Appellant attempts to rely on the alleged confusion caused by the dictum in the Florida Supreme Court's decision of Cooper v. State, 336 So.2d 1133 (Fla. 1976), which he claims he

understood at that time to limit consideration of mitigating circumstances to those specifically mentioned in the statute. He claims that the issue was cloudy until the Florida Supreme Court rendered its opinion in Songer v. State, 365 So.2d 696 (Fla. 1978).

However, Appellant has overlooked the United States Supreme Court opinion in Proffitt v. Florida, 428 U.S. 242, 250, 96 S.Ct. 2960, 49 L.Ed.2d 913, 922 (1976), in which the United States Supreme Court specifically noted that Florida's death penalty statute did not limit consideration of non-statutory mitigating factors. It almost goes without saying that Proffitt was decided long before Appellant's trial occurred and that it should have been obvious to anyone who read Proffitt that non-statutory mitigating evidence could be presented during the sentencing phase of a capital trial in Florida.

A careful reading of Songer, supra, reveals that Appellant's position both in front of Judge Higby and in this Court is untenable. In Songer, the Florida Supreme Court was faced with a Lockett challenge that Florida's statute limited consideration of mitigating factors during the sentencing portion of a capital trial -- this challenge was flatly rejected, and the Florida Supreme Court cited from a number of cases in which evidence of non-statutory mitigating evidence had been allowed and which clearly refuted Songer's contention that Florida's

death penalty statute violated Lockett. Id. at 365 So.2d 700. See Halliwell v. State, 323 So.2d 557 (Fla. 1975); Messer v. State, 330 So.2d 137 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla. 1976); Chambers v. State, 339 So.2d 204 (Fla. 1976); McCaskill v. State, 344 So.2d 1276 (Fla. 1976); Buckrem v. State, 355 So.2d 111 (Fla., opinion filed Jan. 26, 1978). Appellant's trial began on June 19, 1978 -- after all of the above cited cases had been rendered by the Supreme Court of Florida.

Moreover, in Spinkellink v. Wainwright, supra, decided on Aug. 21, 1978, the Court noted that the issue had been considered and rejected by the United States Supreme Court in Proffitt, supra. Although the jury's advisory sentence of death was returned on June 22, 1978, Appellant was not sentenced by the trial court until October 20, 1978. Appellant's lawyer had plenty of time[5] between August and October to raise this issue with the trial court had he felt at that time he would have objected had he understood the correct status of the law. Of course, Appellant's lawyer also had plenty of time to raise this issue before the Supreme Court of Florida, including his alleged excuse for failing to raise the objection at trial. This he did not do either.

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[5]Appellant's case was decided by the Supreme Court of Florida on March 19, 1981.

Despite Appellant's incorrect argument that the status of Florida law at the time of his trial precluded his making an objection to the jury instructions, his argument must fail even if he were correct about what the law was then. In Engle, Justice O'Connor specifically noted "at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." Id. at 71 L.Ed.2d 802.

C. THE RECORD REVEALS APPELLANT FAILED EVEN TO ATTEMPT TO DEMONSTRATE ACTUAL PREJUDICE

Notwithstanding Appellant's failure to demonstrate cause for his double-default on this issue, his argument must fail because he totally neglected to demonstrate "actual prejudice." See United States v. Frady, ___ U.S. ___, 102 S.Ct. ___, 71 L.Ed.2d 816 (1982). In that case, the United States Supreme Court clearly and distinctly held that a habeas Petitioner has "the burden of showing not merely that the errors at his trial created a possibility of prejudice, but that they were to his actual and substantial disadvantage, affecting his entire trial with error of constitutional dimensions." (Id. at 71 L.Ed.2d 832) (Emphasis in original).

Prejudice cannot be presumed. Hopper v. Evans, ___ U.S. ___, 102 S.Ct. ___, 72 L.Ed.2d 367 (1982). In that case, the defendant had been denied a writ of habeas corpus from the district court which had rejected his claim that he had been sentenced under an Alabama statute which unconstitutionally precluded consideration of lesser included offenses. The Fifth Circuit reversed however, basing its reversal upon the fact that the mere existence of the State preclusion clause so infected the defendant's trial that he should be given a new trial in order that he be afforded an opportunity to introduce some evidence of lesser included offenses. The United States Supreme Court reversed stating it would be a perversion of the law to allow the defendant to get away with arguing that he might have been convicted of a lesser offense after he had openly admitted that he had shot his victim in the back, thus negating any claim that he did not intend to kill his victim and that a lesser offense might have been found by the jury.

In Appellant's case, in federal court defense counsel made no effort before Judge Higby to argue actual prejudice, and at trial Appellant himself was permitted to argue to the jury that he deserved the death penalty:

> THE DEFENDANT, MR. BOOKER: You people in the jury box have convicted me of first degree murder, sexual battery, and burglary. And you are going in the room and deliberate over what punishment should

be given for a crime of this nature. A defendant found guilty of such a crime should receive the death penalty. That's it. (Emphasis added).

(SR-850).

D. THE RECORD REVEALS NON-STATUTORY MITIGATING EVIDENCE WAS PRESENTED TO AND CONSIDERED BY THE TRIAL COURT AND JURY

In spite of Appellant's personal request for the death penalty, and despite counsel's failure to establish cause and prejudice for his double default, Appellant's claim must fail for one more reason -- the record reveals that he was not prevented from presenting mitigating evidence in any fashion in any stage of the proceeding. Judge Higby specifically found that Appellant was "allowed to present evidence of and argue to the jury about non-statutory mitigating circumstances." (R-263). For example, Booker was allowed to present evidence of remorse (SR-835) and his lawyer was allowed to argue remorse during his closing argument (SR-870, 871). The lawyer's closing argument included the ineffectiveness of capital punishment as a deterrent (SR-866, 972), the severity of life imprisonment without parole possibility as an alternative to the death penalty (SR-864, 869), and the atrociousness of electrocution (SR-872). The lawyer argued to the jury that it should be considered in mitigation that it was Booker himself who reported the crime to the police (SR-871), and although the jury had found him not to be insane,

the mere fact of the murder must have meant that he did not have the capacity to appreciate what he had done (SR-871).

It must be remembered that the sentencing authority in Florida is the trial court rather than the jury. The state court record reveals that Booker was allowed to present numerous factors in mitigation. The trial court's judgment and sentence (SR-142-150) clearly reveals that the trial court carefully considered all the evidence adduced at trial and the sentencing hearing, the argument of counsel for both parties, a psychiatric report which had been requested by Appellant, medical records submitted by Appellant, memoranda from both counsel concerning sentencing, a letter from Appellant, as well as the jury's recommendation. How then can Appellant be heard to complain that he was precluded from presenting anything in mitigation?

Moreover, the trial court found that there were <u>insufficient</u> mitigating circumstances to outweigh the aggravating circumstances (SR-147). Because no statutory mitigating circumstances were found, the trial court had to have meant that he considered, but rejected, all the non-statutory evidence which had been presented in mitigation.

Appellant has alleged in his brief that he was precluded from submitting evidence and restricted from arguing mitigating factors (Brief of Appellant at 17). However, he has not addressed these specific issues, and accordingly they must be

considered waived. Judge Higby found that the only thing that was precluded was that Booker was not allowed to testify that he would have pled guilty to second degree murder (SR-839), but Judge Higby also found that Booker was allowed to present similar evidence of remorse (R-263). The state court record reveals that Appellant's attempt to introduce his contention (after he was found guilty) that if he had been offered a plea bargain for second degree murder, he would have pled guilty, was rejected on relevancy grounds because no plea bargain had ever been offered (SR-839-840).

Appellant's reliance on Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), is misplaced. In that case, the Fifth Circuit found a death sentence unconstitutional because Mississippi's jury instructions affirmatively precluded the jury from considering nonenumerated mitigating circumstances as required by Lockett. Florida's jury instruction is entirely different. Proffitt v. Florida makes it clear that §921.141, Fla. Stat., is sufficiently clear to guide the jury in determining what sentence should be imposed, and the Standard Jury Instructions track the language of that statute.

Moreover, in Washington v. Watkins, supra, the majority specifically noted that its holding was limited to statutes and situations which were not silent on the issue but had instead affirmatively precluded the jury from considering non-statutory mitigating circumstances:

> Finally, it bears emphasis that we do not here decide whether constitutional error would inhere in a trial court's failure specifically to instruct the jury in a capital case that it was free to consider nonstatutory mitigating factors; our holding is limited to the circumstances of the case at bar, in which the trial court's charge was not silent on the issue but operated affirmatively to include jury consideration of nonstatutory mitigating factors." [Empnasis added; footnotes omitted]

Washington v. Watkins, at 655 F.2d 1377.

The trial court's Judgment and Sentence affirmatively shows that he considered everything that was tendered (SR-142). The record before Judge Higby reveals that Appellant presented numerous non-statutory circumstances to the jury; see previous discussion in this section. Judge Higby found that:

> Rather than being limited to the statutory mitigating circumstances, Booker was allowed to present a number of non-statutory mitigating circumstances.

(R-263).

Moreover, contrary to the situation in Mississippi, Appellant's state court record reveals that the jury was advised that its advisory opinion was to be based on all the evidence and that all evidence must be considered when evaluating mitigating circumstances (SR-874-877). Appellant's situation is identical to the situation in Spinkellink, supra in which identical Florida Standard Jury Instructions were upheld. See also Ford v.

Strickland, 676 F.2d 434 (11th Cir. 1982), rehearing en banc granted April 28, 1982.

In summary, federal habeas corpus review on this issue is precluded under the Sykes-Engle doctrine because of Appellant's double-default. This double default is not excusable because Appellant totally failed to show cause and he did not even make an effort to demonstrate for Judge Higby actual prejudice. Appellant should have been aware of the status of Florida law at the time of his trial. Engle, supra. Moreover, the State asserts that Appellant's counsel was aware of the correct status of Florida law because the record reveals that he was allowed to present and did present anything he wished in mitigation. Accordingly, this point is without merit.

ARGUMENT

III.

APPELLANT'S DEATH SENTENCE WAS NOT BASED UPON INVALID AGGRAVATING CIRCUMSTANCES.

Appellant contends that his death sentence must be vacated because the State was allegedly allowed to introduce evidence of non-statutory aggravating circumstances. In that regard, he has relied upon the former Fifth Circuit's opinion in Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), vacated, ___ U.S. ___, 102 S.Ct. 2922, 73 L.Ed.2d ___ (1982). That decision was recently relied upon by a panel of this Court in Proffitt v. Wainwright, ___ F.2d ___ (11th Cir. 1982).

Appellant's reliance on those two cases, and others like them, is misplaced for the simple reason that the record in his case conclusively shows that neither the jury nor the trial court ever considered non-statutory circumstances during the penalty phase of Appellant's trial. It is apparent from the Judgment and Sentence (SR-142-150) that the trial court considered only the aggravating circumstances specified in Florida's death penalty statute. Similarly, the record reveals that Appellant's jury was instructed that they were limited in their consideration of aggravating factors to those specifically listed in the statute. The trial court charged the jury:

> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence. (Emphasis added)

(SR-874).

In rejecting the contention raised by Appellant, the Supreme Court of Florida clearly and distinctly stated:

> . . . the record reveals that the trial court did not take into account in the "weighing process" any conceivable non-statutory aggravating circumstances.

Booker v. State, at 397 So.2d 918. The Florida Supreme Court went on to explain that the questions which had been posed to Appellant during cross-examination had been "used to negate a mitigating circumstance i.e., that defendant had a significant history of prior criminal activity." Id. This is perfectly allowable under Florida law -- as the Supreme Court of Florida explained, unless the State had an opportunity to negate this mitigating factor, there would be a presumption that Appellant had not engaged in any previous criminal activity.

Judge Higby was faced with the same claim, and he agreed with the Supreme Court of Florida that the record supported the unmistakable conclusion that non-statutory aggravating factors had not played a part in either the jury's advisory recommendation or the trial court's Judgment and Sentence. Judge Higby concluded that the jury had never been advised that non-statutory aggravating factors could be considered and the trial court's

sentencing order did not rely on non-statutory aggravating evidence:

> The evidence came in legitimately as impeachment during the cross-examination. Nothing in the record indicates that the jury was allowed to consider the evidence complained of as proof of an aggravating circumstance.

(R-264).

Of course, what Appellant is really trying to do is to bootstrap his case onto the rationale of the subsequently decided cases of Henry v. Wainwright, supra and Proffitt v. Wainwright, supra. It is significant that in both those cases, the trial court's judgment and sentence specifically included a non-statutory aggravating circumstance which was readily apparent on the face of the record before this Court. However, as has previously been shown, the record in Appellant's case is crystal clear that neither the trial court nor the jury relied upon non-statutory aggravating evidence in reaching their respective decisions. Also, it is clear from the Judgment and Sentence (SR-142-150) that non-statutory aggravating circumstances were not found. Thus, Appellant's case is totally inapposite with Henry v. Wainwright, supra and Proffitt v. Wainwright, supra.

It should also be noted that this is not a case in which the Florida Supreme Court has thrown out an invalid aggravating circumstance and still upheld the death penalty. Again, this demonstrates the fact that Appellant's case is unlike Henry v.

nwright, supra, and Proffitt v. Wainwright, supra. Instead, previously explained, the Florida Supreme Court reviewed this ue in terms of whether the evidence in question was properly itted in order to negate a mitigating circumstance which the ate would otherwise have had no opportunity to negate had the oss-examination on that area been restricted.

It is also significant to note, as both Judge Higby and the orida Supreme Court noted, that the State was extremely limited its questioning concerning Appellant's memory on the day of e crime (R-264). Florida's death penalty statute, §921.141(1), a. Stat., provides that during the sentencing phase relevant vidence pertaining to both the aggravating and mitigating ircumstances shall be admitted. However, the statute does not estrict or direct who shall submit what evidence. Under Florida aw, the State is permitted to submit relevant evidence which ould negate a defendant's proffer of alleged mitigating vidence. Booker v. State, at 397 So.2d 918; Knight v. State, 38 So.2d 201 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla. 976). See also Lockett v. Ohio, supra.

Assuming only for the sake of argument that this Court somehow determines that the rationale of Henry v. Wainwright, supra and Proffitt v. Wainwright, supra can extend to the non-similar facts of Appellant's case, the State submits that neither of these decisions are final and should not be persuasive. In

that regard, one of the five questions certified to the United States Supreme Court in Henry was whether a federal habeas court could reverse a death sentence based upon the consideration of a nonstatutory aggravating circumstance in light of the United States Supreme Court's decision in Proffitt v. Florida, supra. The United States Supreme Court could have vacated Henry for any or all of the five reasons submitted by the State of Florida in its certiorari petition -- it is impossible to guess why the former Fifth Circuit's opinion was vacated when the Supreme Court directed that the opinion be reconsidered in light of Engle, supra, a complicated case dealing with numerous preservation/ procedural default issues.

Furthermore, the State of Florida obviously still does not agree with either Henry v. Wainwright, supra, or Proffitt v. Wainwright, supra, and neither of these decisions should be considered as final authority when they are not final.

In any event, it is clear that the jury was instructed that it was limited in the aggravating circumstances it could consider. It is equally clear that the trial court in his judgment and sentence did not rely upon any non-statutory circumstances. It is also clear that the Supreme Court of Florida viewed Appellant's argument as a question of State law in that the testimony complained of concerned the State's right to negate mitigating evidence, i.e., Appellant wanted the jury to

believe that he did not have a significant History of prior criminal activity. Moreover, unlike Henry v. Wainwright and Proffitt v. Wainwright, the Florida Supreme Court did not uphold a death sentence after throwing out a non-statutory aggravating circumstance. Therefore, since Appellant's case does not involve the type of sentencing and review condemned by Lockett, supra, his argument must necessarily fail on this issue.

ARGUMENT

IV.

THE FEDERAL DISTRICT JUDGE CORRECTLY CONCLUDED THAT APPELLANT WAS NOT ENTITLED TO RELIEF ON THE ISSUE OF WHETHER APPELLANT HAD BEEN DENIED DUE PROCESS DURING APPELLATE REVIEW IN THE SUPREME COURT OF FLORIDA.

A. PREJUDICE CANNOT BE PRESUMED.

Appellant did not allege and does not now contend that the Supreme Court of Florida considered any ex parte documents in his case. Judge Higby realized this at the Panama City hearing, and he even commented that Appellant's situation was entirely different from the other cases because Appellant's record affirmatively reflected that defense counsel had been provided all that was considered by the Supreme Court of Florida:

> THE COURT: Well, Aren't you bound by the allegations that you make in the Petition?
>
> MR. BERNSTEIN: Yes, Sir.
>
> THE COURT: You don't make any allegation in the petition that the Supreme Court consider [sic] material that was exparte or improper?
>
> MR. BERNSTEIN: I make allegations that there are indications that the Supreme Court considered material that is improper in the way it considered it, but I haven't been provided no adequate means to find the parameters of time it appeared to consider material that was inappropriate when my client's case was being considered by that court.

> THE COURT: But where the record affirmatively reflects that they considered only material that you had or that you were provided, isn't that a little bit different?

(Transcript of April 15, 1982 Hearing on Stay of Execution at 31, 32; see also pp. 57-58 where counsel admitted to the district judge that he did not and would not allege the Florida Supreme Court utilized ex parte information in considering this Appellant's cause.)

Judge Higby first rejected Appellant's claim because he correctly recognized that prejudice could not be presumed and that Appellant had not alleged any secret information had been obtained in his case (R-266). See also the previous discussion of Hopper v. Evans, supra. It should be pointed out that Appellant has informed the Court "that there is evidence that the Supreme Court of Florida actually reviewed at least one extra-record document: a post-sentence, prison-generated psychological report." (Brief of Appellant at 33). This was the same allegation that was carelessly made by another attorney who never filed a Notice of Appearance but who filed last minute pleadings in this Court in an attempt to obtain a stay of execution. The truth of the matter is that the document to which Appellant refers was a presentence investigation ordered by the Supreme Court of Florida to be transmitted from the Department of Corrections to the clerk of the Florida Supreme Court. Counsel

for Appellant received notice that this document was being requested -- this notice was afforded to counsel by name. It is crucial that the Court be aware that this presentence investigation was the same presentence investigation which was used by the trial court and cited in his Judgment and Sentence (SR-142). This document was filed as an exhibit with Judge Higby at the Panama City hearing, and it should be in this Court's record (see p. 49 of transcript of Panama City hearing). In any event, Judge Higby based his decision upon the fact that Appellant had received actual notice of all that was considered in his case. He properly concluded that:

> Absent some factual allegation of wrongdoing I may not presume the Florida Supreme Court acted improperly. [Citations ommitted]

(R-266).

B. THE SUPREME COURT OF FLORIDA IS NOT A SENTENCING COURT.

Appellant has recognized that his arguments in this issue have been squarely rejected by a panel of this Court in Ford v. Strickland, 676 F.2d 434, 444 (11th Cir. 1982). The State of Florida realizes that this opinion was automatically vacated when the Court granted rehearing en banc, but the State still insists that the majority in Ford, supra, was correct. First, the Supreme Court of Florida is a reviewing court, rather than a sentencing court, and nonrecord material would be irrelevant to a

reviewing court's determination of the issue. Second, comity and federalism require that the state court's determination on the same issue be accorded a presumption of correctness. See 28 U.S.C.A. §2254(d); Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), after remand, ___ U.S. ___, 101 S.Ct. 1303, 71 L.Ed.2d 480 (1982).

It should also be noted that every court which has considered Appellant's claim has rejected it. See, e.g., Foster v. Strickland, 517 F.Supp. 597 (N.D. Fla. 1981); Witt v. Wainwright, Case No. 80-545-T-GC (N.D. Fla., opinion filed May 14, 1981).

The State of Florida recognizes that this Court's resolution of the issue will be made in Ford v. Strickland, supra. Therefore, the State will not burden the Court with further arguments on the merits of the issue.

C. REGARDLESS OF THE OUTCOME IN FORD V. STRICKLAND APPELLANT SHOULD NOT BE GRANTED RELIEF BECAUSE HIS CASE WAS DECIDED AFTER THE SUPREME COURT OF FLORIDA STOPPED ITS ALLEGEDLY IMPROPER PRACTICE.

Judge Higby's alternative ruling on this issue was that Appellant could not possibly have been harmed by the Florida Supreme Court's practice because his case was decided after the Florida Supreme Court had rendered its opinion in Brown v.

Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied, ___ U.S. ___, 70 L.Ed.2d 407 (1982). During the hearing in Panama City, the State of Florida persuasively argued that because Appellant's case was decided several months after the opinion in Brown was rendered, assuming that the Florida Supreme Court's practice had been improper, it could no longer be presumed that they were continuing that practice after it had been called to their attention (transcript of Panama City Hearing, at 14, 15, 36).

During that hearing, the State relied upon the United State's Supreme Court's opinion in Harris v. Rivera, ___ U.S. ___, 102 S.Ct. ___, 70 L.Ed.2d 530 (1981). In that case, the Court recognized that trial courts routinely hear inadmissible evidence which they are presumed to ignore when making decisions. The Court also reiterated that a silent record is not a sufficient basis for concluding that a state judge has committed error -- and the Court concluded that the mere possibility of error is not enough to warrant habeas corpus relief. Unfortunately for Appellant, he can't even argue that his record is silent. As Judge Higby correctly concluded, the record affirmatively shows that his trial counsel either submitted or was aware of all the matters considered by the jury, the trial court, and the Supreme Court of Florida.

Appellant's argument must fail for one final reason. Since his case was decided after the Florida Supreme Court decided Brown v. Wainwright, supra, if he is correct, then there would be no chance for the State ever to "purge the taint" caused by the Florida Supreme Court's allegedly improper appellate review. This defies common sense. As was pointed out to Judge Higby, when the United States Supreme Court reversed Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed. 398 (1980), they did not throw out all the death penalties in Georgia. Rather, the case was remanded for consideration as to that defendant only (transcript of Panama City Hearing at 35). Based on these principles, Judge Higby correctly ruled alternatively that Appellant was not eligible for relief on this issue, even if the issue turns out to have legal merit.

In conclusion, Judge Higby found that Appellant was not entitled to relief because he totally failed to allege any facts upon which relief could be based (R-266); see also transcript of Panama City Hearing at pp. 51, 52. Second, assuming only for the sake of argument that Ford v. Strickland is decided adversely to the State of Florida, Appellant still is not entitled to relief because his case was decided after the Florida Supreme Court decided Brown v. Wainwright, supra. Thus, this Court must presume that whatever the Florida Supreme Court did prior to Brown v. Wainwright, supra, by their affirming Appellant's judgment and sentence, they did not do anything improper in his

case. Finally, as Judge Higby recognized, the record conclusively supports the conclusion that Appellant's attorney received actual notice of all that was considered by the Florida Supreme Court. Accordingly, this point on appeal is also without merit.

CONCLUSION

Based upon the foregoing arguments and authorities cited, the decision of the United States District Court, Northern District of Florida, should be affirmed.

Respectfully submitted:

JIM SMITH
Attorney General

By: Lawrence A. Kaden
LAWRENCE A. KADEN
Assistant Attorney General

THE CAPITOL, 1502
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR RESPONDENTS/APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Stephen N. Bernstein, 725 N.E. 1st Street, Gainesville, Florida 32602, by U.S. Mail this 27th day of September 1982.

Lawrence A. Kaden
LAWRENCE A. KADEN
Assistant Attorney General

OF COUNSEL

82-5468

UNITED STATES COURT OF APPEAL

ELEVENTH CIRCUIT

STEPHEN TODD BOOKER,

Petitioner/Appellant,

-vs-

LOUIE L. WAINWRIGHT,

Respondent/Appellee

_____/

APPENDIX TO
BRIEF OF RESPONDENT/APPELLEE

Page

Psychological Report
from Dr. Elizabeth A. McMahon A-1

Letter from Stephen T. Booker A-4

Order from Florida Supreme Court
Directing Department of Corrections
to Transmit the Presentence Investigation
to the Clerk of the Supreme Court of Florida . . A-9

Defense Psychiatrist to be called by Hippler to counter prior to, we knowing (not provided to giving test.

Elizabeth A. McMahon, Ph.D.

LICENSED CLINICAL PSYCHOLOGIST
Ψ
4131 N.W. 13TH STREET
GAINESVILLE, FLORIDA 32601
(904) 377-8363

FORENSIC PSYCHOLOGY
NEUROPSYCHOLOGY

September 19, 1978

EVALUATIONS
PSYCHOTHERAPY

Confidential Material

PSYCHOLOGICAL REPORT

Re: STEPHEN TODD BOOKER

Stephen Todd Booker is a 24 year old, black, single male who was evaluated in the Alachua County Corrections Center on August 4, 1978; at the request of his attorney, Mr. Stephen Bernstein. The purpose of the examination was to assess his psychological functioning as it might relate to any of the mitigating circumstances pertaining to the death penalty. Steve was convicted of the rape and first degree homicide of Lorine D. Harmon on November 9, 1977.

Several psychological procedures were administered to Steve approximately one month prior to August 4, 1978; by a member of the Intake Staff of the Corrections Center as part of the Pre-Sentence Investigation request. Since I have knowledge of this staff member professionally and have every confidence in her competence as an examiner, I did not find it necessary to repeat these procedures; but, rather, I used her test data in forming my own interpretation and opinion. The procedures which she administered were: Wechsler Adult Intelligence Scale (WAIS), Minnesota Multiphasic Personality Inventory (MMPI), Sentence Completions, and projective drawings. On August 4, 1978; I administered the Rorschach and the Hand Test in addition to conducting an extensive diagnostic interview.

Test Results

Steve obtained scores on the WAIS which indicate that he is currently functioning within the Above Average to Superior Range of Intelligence. There is no evidence in any of the test material of a major thought disorder or a major affect disturbance. The evaluation revealed Steve to be a young man with suppressed basic needs and affect, emotional over-control and poor interpersonal relationships. Suppressed needs, especially those centering around affection, can be seen in the paucity of his animal percepts on the Rorschach, the percentage of his shading-determined responses, and his projective drawings.

Emotional over-control is reflected in Steve's responses to the more affect stimulating areas of the blots, the ratio of his human to animal percepts, and his sentence completions. Social anxiety, constraint, and poor interpersonal relationships are evidenced in the content of his human percepts, his projective drawings and his responses on the Hand Test. In fact, there are strong suggestions, especially in the Rorschach and his drawings, that his interpersonal relationships are characterized by suspiciousness, hostility, and a paranoid point of view.

Finally, the pattern of Steve's responses on the MMPI is compatible with individuals who are generally impulsive and irresponsible in their behavior; and are untrustworthy, shallow, and superficial in their relationships with others. Many temporarily create a favorable impression because they are internally comfortable and free from inhibiting anxiety, worry and guilt but are actually quite deficient in their role-taking ability.

Judgement is notably poor in these people and they do not seem to learn from past experiences. They lack the ability to postpone gratification of their desires and therefore have difficulty in any enterprise requiring sustained effort. Nonconforming, antisocial and unlawful conduct is frequently associated with this personality type, and it is likely that they have a history of acting-out and conduct disturbance of one type or another. In fact, such a profile indicates the probability of explosive outbursts of aggression.

Clinical Impressions

What, then, do these data mean with regard to Stephen Booker as an individual and how do they relate to any of the mitigating circumstances? Steve is a young man of above-average intelligence who evidences suppressed needs, emotional over-control, and poor interpersonal relationships. He describes a childhood in which he lacked an adequate male role model and was, apparently, given little structure, stability or supervision. Left to his own devices, he quit school after the 8th grade and began to engage in acting-out behavior including alcohol and drug abuse, assault and robbery. This pattern continued through Steve's years in the army and until the present time.

He relates that he has had visual and auditory hallucinations since the age of six or seven. However, his description of these episodes makes it difficult to tell if they have been valid hallucinations, imaginings, daydreams, or simply his own thought processes. Although he also states that he has had several psychiatric hospitalizations, he said that the reasons for admission were primarily observation and alcohol and drug abuse. Unfortunately, it is impossible to verify this without the hospital records. Nevertheless, there is no indication of a prior or present thought disorder in any of the test material or interview data.

Steve is a bright person but the pattern of his life has been an antisocial one, and he has, apparently, not learned from his previous experiences - at least with regard to punishment. What he did learn, and at a very early age, was that he could easily obtain what he wanted by illegal means and that he could control others through fear and manipulation. Consequently, the interpersonal relationships which he describes are of a superficial and immediate need gratifying nature with little care or concern for the other person. It is certainly not surprising, therefore, to find the elements of suspicion, hostility, and paranoia in both his test material and his everyday social interactions.

There are two elements regarding the day in question, and shortly thereafter, that are of concern. First, Steve maintains that he does not remember the incident itself although he can recount events earlier and later that same day. However, he states that he had consumed quite a variety of intoxicants during the morning of November 9, 1977; that he has had other periods when he

[illegible] a lot of drugs; and therefore that he was not clear, considered later he again became aware of his surroundings and activities later in the day.

The second element is somewhat related and concerns Steve's behavior, as described by Officer Michael W. Price, at the time of his arrest. Although the episodes of apparent personality change are still an enigma, several hypotheses might be entertained as to their etiology, assuming that they were genuine. The most probable one, in my clinical opinion - based on my evaluation of Steve, the depositions of the law enforcement officers, and my interview with Officer Price - is that this act of homicide was ego-alien and unacceptable to Steve and, therefore, he had to compartmentalize, distance, and project his behavior and the consequent responsibility for it onto another personality. Although he has engaged in prior acts of violence, they could always be rationalized by him as being in accord with a code of behavior which someone else had abridged. The same was not true of the [illegible] - i.e. that was not carried out "according to the rules."

"ANTI SOCIAL"

Conclusions

Therefore, it is my clinical opinion, based on a reasonable degree of psychological certainty, that on November 9, 1977; Stephen Todd Booker was not under the influence of extreme mental or emotional disturbance and that he was not acting under extreme duress or under the substantial domination of another person. The third primarily psychological consideration - his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law - is not so clear-cut.

NO MITIG CIRCU

Certainly one may assume some impairment in this capacity due to the amount and combination of intoxicants which Steve relates that he consumed that day. Furthermore, during most of his lifetime, he has been successful and therefore reinforced for engaging in antisocial behavior. Such a history results in an individual with few internal controls and poor self-discipline. This, in conjunction with the intoxicants, most probably rendered him less able than the average individual to conform his conduct to the requirements of the law. However, I am unable to render an opinion as to whether this condition was of such a magnitude as to constitute "substantial impairment."

Unfortunately, a very bright young man sought his challenges through socially unacceptable and non-adaptive avenues. Success only escalated this pattern until it became a way of life for him - culminating in this most tragic incident. In essence, two lives have been lost.

[illegible]
Elizabeth A. McMahon, Ph. D.
Licensed Clinical Psychologist

EAMcM:EFG

Best Copy Available

Best Copy Available

P.S.

...ed in seriously. This time it's heard a guy say on radio that 25 years ago a nation when it set out to ... [illegible] ... the rail it into an interstate system! [illegible] practice that they have to do the investment, because someone, some little men, reason not the first and immediate starting occupancies after watching their own hands employed on an act they have no want to be a part of. It is a most curious time to be alive, the ... [illegible] ... you understand? (Not speaking for a time is not / Not speaking him of his right to even holler out to you to pray to you even to get himself and note no change.) Help me! Pray.

IN THE SUPREME COURT OF FLORIDA

FRIDAY, MAY 11, 1979

STEPHEN TODD BOOKER,

Appellant,

vs. CASE NO. 55,563

STATE OF FLORIDA,

Appellee.

Docketed
5-15-79
Florida Attorney
General's Office

It is hereby ordered that the Department of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the presentence investigation in this cause.

RECEIVED
MAY 15 1979
ATTORNEY GENERAL'S OFFICE

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

B

cc: Louie L. Wainwright
Stephen N. Bernstein, Esq.
Hon. Jim Smith

A-9

SPENCER D. MERCER
CLERK

United States Court of Appeals
ELEVENTH CIRCUIT
OFFICE OF THE CLERK
56 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303

IN REPLYING, GIVE NUMBER OF CASE AND NAMES OF PARTIES

August 9, 1983

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 82-5468 Booker v. Wainwright

The following action has been taken in the above case:

☐ AN EXTENSION OF TIME has been granted to and including

☐ for filing appellant's/petitioner's brief.

☐ for filing appellee's/respondent's brief.

☐ for filing reply brief.

☐ for filing petition for rehearing. 8-12-83

AUG 12 1983
DEPT. OF LEGAL AFFAIRS
CRIMINAL DIVISION

☐ It is specifically understood and agreed by the movant for extension, that the document above will be filed on or before this new date, and further agreed that no additional extensions will be requested by the movant.

☐ Motion to consolidate granted.

☐ Motion to supplement or correct the record granted.

☐ Motion for leave to file supplemental brief granted.

☐ Motion for leave to file brief amicus curiae is granted.

☐ Joint motion as to time for filing briefs granted.

☒ Order enclosed has been entered.

☐

SPENCER D. MERCER, CLERK

By Lamy Johnson
Deputy Clerk

cc: Stephen Bernstein
Larry Kaden

IN T . UNITED STATES COURT OF AP ALS

FOR THE ELEVENTH CIRCUIT

No. 82-5468

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
AUG 9 1983
Spencer D. Mercer
Clerk

STEPHEN TODD BOOKER,

Petitioner,

versus

LOUIE . WAINWRIGHT, Secretary, Dept. of Offender Rehabilitation, State of Florida,

Respondent.

AUG 12 1983
DEPT. OF LEGAL AFFAIRS
CRIMINAL DIVISION

Appeal from the United States District Court for the Northern District of Florida

8-12-83
Florida Attorney General

O R D E R :

( ) The motion of _____ for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of _____ for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

(✓) The motion of APPELLANT for a further stay of the issuance of the mandate is GRANTED to and including SEPTEMBER 6, 1983, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of APPELLANT for a further stay of the issuance of the mandate is DENIED.

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5468

STEPHEN TODD BOOKER,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary,
Department of Offender Rehabilitation,
State of Florida,

Respondent-Appellee.

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
JUL - 5 1983
Norman E. Zoller
Clerk

- - - - - - - - - - - - -

Appeal from the United States District Court for the
Northern District of Florida

O R D E R :

( ) The motion of appellant for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(✓) The motion of appellant for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including Aug. 7, 1983, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

UNITED STATES CIRCUIT JUDGE

MDT-4
(Rev. 6/82)

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK

NORMAN E. ZOLLER
CLERK

TEL. 404-221-6187
FTS-242-6187
56 FORSYTH ST. N.W.
ATLANTA, GEORGIA 30303

July 6, 1983

Mr. Stephen Bernstein
Attorney at Law
P.O. Box 1642
Gainesville, FL 32602

JUL 8 1983

DEPT. OF LEGAL AFFAIRS
CRIMINAL DIVISION

No. 82-5468 Booker v. Wainwright, etc.

MANDATE STAYED TO AND INCLUDING August 7, 1983.

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that Court.

A copy of the opinion, judgment, or Rule 25 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

NORMAN E. ZOLLER, Clerk

By: Lynn Johnson
Deputy Clerk

Encls.

cc: Larry Kaden, AAG

MDT-2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5468

TEPHEN TODD BOOKER,

Petitioner-Appellant,

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US COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
JUL - 5 1983
Norman E. Zoller
Clerk

OUIE L. WAINWRIGHT, Secretary,
epartment of Offender Rehabilitation,
tate of Florida,

Respondent-Appellee.

- - - - - - - - - - - -

eal from the United States District Court for the
Northern District of Florida

tion of appellant
stay ☐ recall and stay of the issuance of the mandate
petition for writ of certiorari is DENIED.

tion of appellant
stay ☐ recall and stay of the issuance of the mandate
petition for writ of certiorari is GRANTED to and includ-
7, 1983, the stay to continue in force until the
disposition of the case by the Supreme Court, provided that
the period above mentioned there shall be filed with the
of this Court the certificate of the Clerk of the Supreme
that the certiorari petition has been filed. The Clerk
ssue the mandate upon the filing of a copy of an order of
reme Court denying the writ, or upon the expiration of the
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tion of
further stay of the issuance of the mandate is GRANTED to
cluding , under the same conditions as
th in the preceding paragraph.

RDERED that the motion of
further stay of the issuance of the mandate is DENIED.

UNITED STATES CIRCUIT JUDGE

MDT-4
(Rev. 6/82)

OCT 7 PAGE

No. 83-5209

IN THE SUPREME COURT OF
THE UNITED STATES

October Term 1982

RECEIVED
SEP 27 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STEPHEN TODD BOOKER,

Petitioner,

-vs-

LOUIE L. WAINWRIGHT, Secretary of the Florida Department of Corrections,

Respondent.

PETITIONER'S RESPONSE TO
RESPONDENT'S BRIEF IN OPPOSITION

Law Offices of
STEPHEN N. BERNSTEIN, P.A.
609 N.E. 1st Street
Post Office Box 1642
Gainesville, Florida 32602
904/373-9555

Counsel for Petitioner

9

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No. 83-5209

IN THE SUPREME COURT OF
THE UNITED STATES

October Term 1982

STEPHEN TODD BOOKER,

Petitioner,

-vs-

LOUIE L. WAINWRIGHT, Secretary,
of the Florida Department of
Corrections,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITIONER'S RESPONSE TO
RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, STEPHEN TODD BOOKER, by and through his undersigned counsel respectfully requests that this Court consider the following statements in response to specific points raised in the Brief in Opposition filed by Respondent as follows:

1. At page 6 in the second paragraph, Respondent states: "However, in Petitioner's case, the Supreme Court of Florida found that 'the record does not conclusively show that the state attorney secured this information from the psychiatric reports.'" There was never any factual determination in that no hearing on this question was ever allowed by the trial court. Nevertheless, there was never any indication of another source

for this particular information used by the state attorney in cross-examination in the discovery granted in this case. It is important to note that counsel deposed every witness disclosed by discovery and had examined all evidence disclosed by discovery. If this particular information used by the state attorney came from a non-disclosed source, then there would be a clear discovery violation under Rule 3.220 of the Florida Rules of Criminal Procedure. Out of all the material on the record in this case, there is only one source for the material used by the state attorney in cross-examining the Petitioner and that was the court ordered psychiatric interviews.

2. At page 8 in the second paragraph, the Respondent states as follows:

"Respondent also disagrees with Petitioner's attempt to insert the issue of the reliability of Petitioner's admission on cross-examination that he had been convicted of numerous Article 15's while he was in the Army. These questions were not objected to at trial, and Petitioner's lawyer did not raise them on direct appeal or even in the federal district court. They were raised for the first time on rehearing in the Eleventh Circuit."

These questions were objected to and were the subject of a motion for mistrial at the trial court level. The nature of the objection involved an Estelle v. Smith, 451 U.S. 454 (1981) violation. Further, the reliability issue was raised specifically in a motion for new trial at the trial court level. Both of these matters were clearly raised from the outset.

When the Eleventh Circuit Court of Appeal ruled on the Estelle question, they rationalized under the decision in Harris v. New York, 401 U.S. 222 (1971), that the Petitioner's case did not have any merit. The Petitioner in response raised an argument to the Eleventh Circuit Court of Appeal's ruling, and did not raise a new issue.

3. On page 13 in the last sentence, the Respondent stated: "In the alternative, certiorari should be denied on this issue because the record refutes Petitioner's allegations that he was denied the opportunity to prevent non-statutory mitigating factors during the sentencing proceedings." It is assumed that the word "prevent" was a typographical error and Respondent meant to use present. The issue is not that of allowing a Petitioner to present mitigating circumstances but rather the issue is whether the jury thought they could consider such mitigating circumstances. The Respondent incorrectly construes the arguments raised by Petitioner.

4. On page 15, the Respondent states in the last sentence: "Unfortunately for Petitioner, as was pointed out in the federal district court as well as the Eleventh Circuit, he cannot even argue his record is silent because his record affirmatively shows that his trial counsel neither submitted or was aware of all the matters considered by the jury, the trial court, and the Supreme Court of Florida." The undersigned counsel is certainly familiar with what was considered by the jury and the trial court. However, it is quite the contrary when it comes to the Florida Supreme Court. The whole issue is that no one knows what non-record material the Florida Supreme Court considered. There are indications in the record that in some cases there was non-record material considered. The Florida Supreme Court, rather than describe what material they considered, decided to make a statement that it did not effect their consideration in any case. Counsel has no way of knowing at the present time what non-record material may have been considered by the Florida Supreme Court.

Respectfully submitted,

LAW OFFICES OF STEPHEN N. BERNSTEIN, P.A.

BY: Stephen N. Bernstein

STEPHEN N. BERNSTEIN
Counsel for Petitioner
609 N.E. 1st Street
P.O. Box 1642
Gainesville, Florida 32602
904/373-9555

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to LAWRENCE A KADEN, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, Florida 32301, by U.S. Mail this 23rd day of September, 1983.

Stephen N. Bernstein

STEPHEN N. BERNSTEIN